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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ANDRZEJ KUHL, STEPHEN SCHLESINGER, BARBARA SCHLESINGER, MARY ALLEN, ROBERT C. HOLMES, THOMAS KELLY, PATTERSON SMITH, ALICE F. FREED, PATRICK FINNEGAN, CULLEN MCVOY AND ELIZABETH MCVOY,

Petitioners,

against

BOARD OF ADJUSTMENT OF THE TOWNSHIP OF MONTCLAIR AND B'NAI KESHET MONTCLAIR JEWISH CENTER,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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85 pp

Questions Presented

1. Where the state land use law gives religious groups as a class preferred treatment in obtaining a use variance to install a house of worship in a residential zone, with the result that surrounding neighborhoods are forced to suffer greater harm, does this advance religion in violation of the Establishment Clause?

2. Where preferred treatment means that a zoning board must determine the moral benefits of the religious use and weigh them against harm to the neighborhood, does this cause excessive government entanglement with religion in violation of the Establishment Clause?

3. Where the Free Exercise Clause is invoked to give preferred treatment to an underrepresented religious group in order to foster religious diversity, without finding that the group's religious freedom has been abridged, does this advance religion and cause excessive government entanglement with religion in violation of the Establishment Clause?

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Jurisdiction

The order of the New Jersey Supreme Court dismissing petitioner's appeal for failure to raise a substantial constitutional question was entered on March 11, 1998. The jurisdiction of this Court is invoked under 28 U.S.C, Sec. 1257.

Statutes and Constitutional Provisions

New Jersey Municipal Land Use Law, 40:55D-70(d):

The board of adjustment shall have the power to: . . .

In particular cases and for special reasons, grant a variance to allow departure from regulations pursuant to article 8 of this act to permit: (1) use . . . in a district restricted against such use . . .

No variance or other relief may be granted under the terms of this section unless such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purpose of the zone plan and zoning ordinance.

United States Constitution, Amendment I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . .

Statement of Facts

Montclair has a population of less than 40,000 with 54 houses of worship and ample zoning accommodation for more. Rather than build in a permitted zone, respondent B'nai Keshet Montclair Jewish Center applied to the Board of Adjustment for a use variance and site-plan approval to create a religious complex on a property in an "R-1" single-family residential zone. The property consisted of one-and-a-half acres containing an historic home. The applicant proposed to use the home for a school, and add a building three times its size containing offices, assembly space, full catering facilities and a large front-yard parking lot.

At the hearings, the Board scheduled a special session to hear thirty supporters of B'nai Keshet, virtually all of whom lived outside the neighborhood (and many outside of Montclair), including priests, rabbis and ministers of various denominations, as well as speakers on constitutional law. They deplored that Montclair should require a variance for a house of worship anywhere in town and insisted that the applicant was entitled to special treatment pursuant to the Religious Freedom Restoration Act of 1993 (42 USC 2000 bb et. Seq., "RFRA").

On January 18, 1994, the Board approved the use of the property for a house of worship but denied the applicant's site plan, citing intense overdevelopment of the site (Appendix A). The applicant submitted a revised site plan that provided for a building equally large as originally proposed but with a much reduced parking lot that forced parking onto neighboring streets. This second site plan was approved by the Board on July 19, 1995 (Appendix B).

Petitioners raised their constitutional arguments on appeal to Superior Court, which affirmed the Board's action on April 10, 1996 (Appendix C, pages 34*a* and 35*a*). On appeal to the Appellate Division the Superior Court's ruling was affirmed on November 14, 1997 (Appendix D). On

appeal to the New Jersey Supreme Court the appeal was dismissed for failure to raise a substantial constitutional question on March 11, 1998 (Appendix E).

Argument

The New Jersey Municipal Land Use Law authorizes the grant of a use variance based on "special reasons." According to case law, applicants for such a variance must show that the use advances one or more of the purposes of zoning listed in the statute, and that the property is particularly suited to the proposed use. They must also show, by an "enhanced standard of proof," that regardless of the benefits of the use, it will not cause substantial detriment to the neighborhood or zone plan.

An exception is made for applicants proposing a use which is deemed "inherently beneficial." They are entitled to preferred status which eliminates the above requirements in favor of a less stringent legal standard and burden of proof. They need only show that the benefits of the use outweigh the detriments (the "balancing test"). This requires the local zoning board to determine the public value of the inherently beneficial use, and if it is great enough, grant the application even though the use would otherwise be found to cause substantial detriment. The result is that the neighborhood is exposed to greater harm where the applicant qualifies for preferred status.

The New Jersey courts have held that inherently beneficial uses are those which provide public services benefiting the general health and welfare, including hospitals, schools, housing for the poor and homeless, senior citizen congregate housing, community residences for the disabled, facilities for victims of domestic violence and child care centers. These are "privatized" public services which supplement those provided by governmental agencies, and which might otherwise be excluded by zoning restrictions in inhospitable local communities.

The rulings below add to the list a new class of facility which does not belong—all houses of worship regardless of what public services they provide. This elevates houses of

worship, which exist primarily for the benefit of their members, to the same level as public service facilities which provide for the general health and welfare without regard to religious affiliation. The rulings also place houses of worship on a higher level than equivalent secular facilities which are protected by the Free Speech Clause of the First Amendment, such as civic and philanthropic clubs, museums, art galleries, theaters, meeting halls and other places of assembly. This violates the Establishment Clause.

Moreover, the balancing test requires the zoning board to determine how much the religious use will benefit the public, and the greater the benefit, the greater the harm that can be imposed upon the surrounding neighborhood in the form of increased noise and congestion. Giving all religious institutions this benefit to the direct detriment of private citizens constitutes undue support of, and entanglement with, religion in violation of the Establishment Clause.

On top of this blanket preference for religious institutions, the rulings below use the Free Exercise Clause as it was never intended—as an affirmative ground for special zoning treatment of particular religious institutions regardless of whether their religious freedom was ever abridged. In the name of religious freedom, preference is given to a particular group based upon a finding that it is underrepresented in Montclair, and will therefore contribute to religious "diversity." This runs afoul of the Establishment Clause.

The Free Exercise Clause is thus being misused to further religious freedom where there is no religious restraint. This group's exercise of religion was never restrained in Montclair, by its zoning laws or otherwise. The group was granted a variance to build a house of worship in a single-family zone, yet there was no good reason why it could not have built in an area zoned for such use. The Town's zone plan made ample provision for religious uses in other zones, but the group had rejected such properties because they were,

in the words of the Appellate Division, "either too expensive or would not meet the congregation's needs."

Absent a finding of restraint of free exercise of religion, special treatment based on the Free Exercise Clause can only mean affirmative support of religion in violation of the Establishment Clause. It means support of one religious group over others which cannot claim to be underrepresented in the community, and over secular groups which *ipso facto* make no contribution to religious freedom.

Here the religious identity of the applicant won approval of a plan to impose an oversized religious complex with inadequate parking upon a quiet residential neighborhood. We submit that this exceeds constitutional limits and warrants review by this Court.

POINT I

The Establishment Clause prohibits the state from advancing religion in general by classifying houses of worship as "inherently beneficial," thereby giving them special zoning treatment to the detriment of surrounding neighborhoods.

The Municipal Land Use Law (N.J.S.A. 40:55D) provides for the granting of a use variance upon a showing, among other things, of "special reasons" for making an exception to the existing zone plan. The courts have construed special reasons to mean that the use advances the "purposes of zoning" listed in the statute. (N.J.S.A. 40:55D-2) Thus, applicants for such a use variance must show (1) that the use advances one or more of the purposes of zoning listed in the statute, (2) that the property is particularly suited to the proposed use and (3) that by an "enhanced standard of proof," regardless of the benefit of the use, it will not cause substantial detriment to the neighborhood or zone plan. *Medici v. BPR Co.*, 107 N.J. 1, 526 A.2d 109 (1987).

There is one major exception to this rule. One of the purposes of zoning listed in the statute is promotion of the "general public welfare" (N.J.S.A. 40:55D-2(a)). The courts have held that uses which by their nature advance this purpose are "inherently beneficial" and are afforded special treatment. They are permitted a lower legal standard and burden of proof to obtain a variance, and the surrounding neighborhood is expected to tolerate a greater degree of detriment as a result of the use than one which is not inherently beneficial. *Sica v. Bd. of Adj. of the Tp. of Wall*, 127 N.J. 152, 165 (1992).

Applicants under the preferred standard are excused from all of the above burdens of proof; they need only show that the benefits of the proposed use, on balance, outweigh the detriments. (*Sica, supra*). Under this "balancing test" the more a zoning board values the particular "inherently beneficial" use, the more detriment the board can impose upon the surrounding neighborhood as a result of that use.

The list of uses which are deemed inherently beneficial is derived from an *ad hoc* process of statutory amendment and judicial construction. The New Jersey Supreme Court has made reference to housing for the poor and homeless, low and moderate income housing, senior citizen congregate housing, community residences for the disabled, facilities for victims of domestic violence and child care centers, health care facilities for the elderly, private schools and hospitals (See *Sica, supra; Coventry Square, Inc. v. Westwood Zoning Board of Adjustment*, 138 N.J. 285, 296, 650 A.2d 340 (1994)) Other uses have been added to the list by the Legislature: community residences for the developmentally disabled (N.J.S.A. 40:55D-66.1), community centers for victims of domestic violence (*Id.*), and child care centers (N.J.S.A. 40:55D-66.6).

The lower courts held that under the Municipal Land Use Law religious institutions *per se* are "inherently beneficial" and therefore entitled to special treatment in

obtaining a use variance. This constitutes undue state support of, and entanglement with, religion in violation of the Establishment Clause. It places religious groups, which exist primarily for the benefit of their members, on an equal footing with organizations that provide public services benefiting the general welfare, health, order and security without regard to religious affiliation.

At the same time, the ruling below places houses of worship on a higher footing than equivalent secular facilities which are also protected by the First Amendment (Free Speech Clause) such as civic and philanthropic clubs, museums, art galleries, theaters, meeting halls and other places of assembly. It also fosters undue entanglement in that it requires local zoning boards to make an assessment of the benefit of the religious use to the public and weigh that benefit against the harm it will do to the neighborhood and zone plan.

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion." This provision, the Establishment Clause, has been applied to the states since *Cantwell v. Connecticut*, 310 U.S. 296, (1940). This Court has held that the Establishment Clause prohibits the states from favoring religion over the secular, as well as one religious sect over another. See for example *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (Government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers . . ."); *Grand Rapids School Dist.*, 473 U.S. at 389, 105 S.Ct. at 3225, 87 L.Ed.2d at 281 (Establishment Clause is violated "when the government fosters a close identification of its powers and responsibilities with those of any—or all—religious denominations.")

This Court has held that a broad grant to religious groups of preferential legal standards and lower burdens of proof violates the Establishment Clause. See *Heffron v.*

International Soc'y for Krishna Consciousness, 452 U.S. 640, 652 (1981) ("Nor for present purposes do religious organizations enjoy rights to communicate, distribute, and solicit on the fairground superior to those of other organizations having social, political, or other ideological messages to proselytize."); *Abington Township v. Schempp*, 374 U.S. 203 (1963); and *Torcaso v. Watkins*, 367 U.S. 488, 495 (1961) (government cannot "constitutionally pass laws or impose requirements which aid all religions as against non-believers ...."). A judicial decision which applies an easier standard to houses of worship than to secular uses under the assumption that religion is *per se* a public good violates the strict neutrality approach required by this Court and the First Amendment.

In addition, most recently, in City of Boerne v. P.F. Flores, Archbishop of San Antonio and United States, __ U.S. __ , 117 S.Ct. 2157, 138 L.Ed.2d 264, 1997 U.S. LEXIS 4035 (June 25, 1997), this Court found unconstitutional the Religious Freedom Restoration Act of 1993. Although the Court did not ultimately rule based on the Establishment Clause, Justice Stevens, in his concurring opinion, expressed the view that the statute violated the Establishment Clause because it gave a procedural advantage to a religious institution which was not available to secular groups:

> In my opinion, the Religious Freedom Restoration Act of 1993 (RFRA) is a "law respecting an establishment of religion" that violates the First Amendment to the Constitution.
>
> If the historic landmark on the hill in Boerne happened to be a museum or an art gallery owned by an atheist, it would not be eligible for an exemption from the city ordinances that forbid an enlargement of the structure. Because the landmark is owned by the Catholic church, it is

> claimed that RFRA gives its owner a federal statutory entitlement to an exemption from generally applicable, neutral civil law. Whether the Church would actually prevail under the statute or not, the statute has provided the Church with a legal weapon that no atheist or agnostic can obtain. This governmental preference for religion, as opposed to irreligion, is forbidden by the First Amendment. *Wallace v. Jaffree*, 472 U.S. 38, 52-55 (1985)

Further, the Sixth Circuit Court of Appeals made the following observation in *Lakewood, Ohio Cong'n of Jehovah's Witnesses, Inc. v. Lakewood*, 699 F.2d 303, footnote 2 (6th Cir.), *cert. denied*, 464 U.S. 815 (1983):

> Courts striking down such ordinances [that exclude churches from residential districts] have reasoned that the presence of churches in residential areas is beneficial to the public morals and welfare.... This reasoning is problematical because an ordinance permitting churches but excluding secular interests also protected by the First Amendment runs afoul of the Establishment Clause. On the other hand, not all political and social organizations have been traditionally viewed as beneficial to public welfare and morals. Therefore, the original rationale for permitting churches in residential areas fails.

If houses of worship are deemed to be inherently beneficial, they are being given preferred treatment over other secular interests that are protected by the First Amendment. The Free Speech Clause of the First Amendment protects museums, art galleries, club houses, theaters, meeting halls and other places of assembly. These facilities are frequently zoned out of single-family residential neighborhoods and none

of them are listed as inherently beneficial. In fact, civic and philanthropic organizations have been expressly held not to be inherently beneficial. For example, a woman's club, incorporated "to create an organized center of thought and action among women for their intellectual and social advancement and united effort to assist in civic and philanthropic work," was excluded from this preferred category. *Skaf v. Zoning Bd. of Adjustment of Asbury Park*, 35 N.J. Super 215 (App. Div. 1955) Thus, since like-kind secular activities are not given the benefit of inherently beneficial status under New Jersey law, neither can houses of worship.

The inclusion of religious places of assembly on the inherently beneficial list compels inclusion of all places of assembly. In *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed.2d 476 (1991) this Court held that it is presumptively unconstitutional under the Freedom of Speech Clause to place burdens on speech because of its content. To justify such different treatment of speech, the government must show that the law is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.

On the basis of this fundamental principle, houses of worship across the country have overturned zoning schemes which allow for theaters within a commercial district but not houses of worship (i.e., speech with secular or political content allowed within the commercial zone while speech with a religious content is prohibited). See *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991). This argument works both ways. Just as a zoning scheme cannot lock out religious speech where secular speech is allowed, a zoning scheme cannot lock out secular speech where religious speech is allowed. Thus, by affording religious expression the benefit of the less restrictive "balancing test," the benefit of that same standard must be

accorded to all forms of expression. The New Jersey courts have not extended that benefit. *Skaf, supra.*

The New Jersey tribunals below held that since religion promotes "morals" and the "general welfare," placing religion in a preferred category does not violate the Establishment Clause. We submit that this is not the case. The standard for determining the proper application of the Establishment Clause is the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971). Under the *Lemon* test, a statute must meet three criteria: (1) it must have a secular legislative purpose, (2) its primary effect must be one that neither advances nor inhibits religion and (3) it must not foster excessive government entanglement with religion.

New Jersey's grant of special zoning treatment to houses of worship, *per se*, while excluding equivalent secular facilities cannot meet any of the above tests under *Lemon.* Conferring special treatment based solely upon the religious use of a facility cannot be said to have a secular legislative purpose, and such a rule clearly has the effect of advancing religion. The truly neutral way to accommodate religious facilities is to simply allow them in a zone that permits places of assembly, both religious and secular.

As to entanglement, it is inevitable that a zoning board will become unduly entangled with religion in carrying out its duties under the statute as construed by the New Jersey courts. The board must assess the benefit of the *religious use* to the public in order to weigh it against its detriment to the neighborhood and zone plan. This means making inquiries into, and judgments regarding, the effectiveness of the religious teachings of the congregation in improving the morals of the community, and then weighing it against the physical harm the use will do to the neighborhood. The result is that the Board's finding regarding moral benefit has a direct bearing on how much the surrounding neighborhood will be required to suffer in terms of increased noise and congestion.

Even assuming that all religions promote morals and the general welfare, this is not a basis for the state to confer a special benefit. Mandating that public schools open with Bible readings or recitation of non-denominational prayers could arguably be said to promote "morals" and the "general welfare," but this Court has found that both these practices aid religion and are thereby prohibited under the Establishment Clause. See *Engel v. Vitale*, 370 U.S. 421 (1962) (the government may not prescribe any particular form of prayer to be used in schools) and *Abington School District v. Schempp*, 374 U.S. 203 (1963) (Bible readings and the Lord's Prayer at the opening of the school day are "religious practices.")

The lower courts relied on *Walz v. Tax Comm'n of New York*, 397 U.S. 664 (1970) for the proposition that the Establishment Clause is not violated when New Jersey characterizes houses of worship as an inherently beneficial use. That reliance is misplaced. Justice Burger's majority opinion sustains the tax-exempt status of religious organizations but only because (1) statutes of this type date back to the framers of the U.S. Constitution, (2) the statute in question was clearly and broadly drawn to include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups, and (3) experience has shown that statutes of this type result in less government entanglement with religion.

In contrast, the inherently beneficial category is (1) a recently created legal concept which was (2) never defined by statute but injected and enlarged by the courts on an *ad hoc* basis, excluding many of the facilities cited in *Waltz*, and which (3) fosters government entanglement with religion by requiring a zoning board to determine and then balance the benefits of the religious use against the harm it does to the neighborhood and zone plan.

Failure to meet any aspect of the *Walz* exception is fatal

under the Establishment Clause. As this Court clarified in *Lemon v. Kurtzman, supra*, its decision in *Walz* substantially relies on the fact that the type of tax exemption in question pre-dated the formation of the Republic and was approved by the founding fathers. Since zoning is a concept that dates back only to the turn of this century, this aspect of the *Walz* test is not met here.

In addition, it is a fatal flaw to draw a category for special treatment too narrowly. This is shown by a comparison of *Committee for Public Education v. Nyquist,* 413 U.S. 756 (1973), in which this Court held that a tax credit for non-public school tuition that primarily benefits parochial schools violates the Establishment Clause, with *Mueller v. Allen*, 463 U.S. 388 (1983) in which this Court held that a tax deduction for all parents for all educational expenses does not violate the Establishment Clause. Here the concept of inherently beneficial is determined haphazardly on a case-by-case basis by the New Jersey courts, occasionally assisted by piecemeal legislation, in an effort to give meaning to the otherwise undefined Municipal Land Use Law concept of "special reasons."

Note that *Lakewood, Ohio Cong'n of Jehovah's Witnesses,* quoted above, was decided after *Walz v. Tax Comm'n of New York, supra.* Thus, the Sixth Circuit in *Lakewood,* noting that the Establishment Clause would be violated by a zoning ordinance which expressly permits houses of worship but not secular places of assembly, does not agree with New Jersey's very broad reading of *Walz.* Moreover, this Court has held that legislation mandating that children receive religious education in the public schools is not saved merely because the same legislative scheme also mandates that they be instructed in personal hygiene. *Abington Township v. Schempp*, 374 U.S. 203 (1963); *Engel v. Vitale*, 370 U.S. 421 (1962).

In the absence of a compelling state interest that

distinguishes the detrimental effects flowing from a civic clubhouse or art theater from that of a house of worship, they may not constitutionally be treated differently. See *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 103 L.ed. 2d 1, 109 S.Ct. 890 (1989) (strikes down sales tax exemption exclusively for religious publications); *Simon & Schuster, Inc. v. Members of the New York State Crime Victims Board*, 502 U.S. 105, 112 S.Ct. 501, 116 L.Ed. 2d 476 (1991) (It is presumptively unconstitutional under the Freedom of Speech Clause of the First Amendment to place burdens on speech because of its content; to justify such differential treatment of speech, the government must show that the regulation is necessary to serve a compelling state interest and is narrowly drawn to achieve that end); and *Cornerstone Bible Church v. City of Hastings*, 948 F.2d 464 (8th Cir. 1991) (Freedom of Speech Clause prevents enforcement of zoning regulations that prohibit a house of worship from locating in a zone where secular places of assembly can locate).

POINT II

The state may not invoke the Free Exercise Clause to advance one religion over another, or religious use over secular use in the name of religious "diversity" and in the absence of any finding of religious restraint.

The rulings below expressly invoked the Free Exercise Clause of the First Amendment to give additional special treatment to this particular religious group. The Courts below upheld the ruling of the Montclair Board of Adjustment which found, as a separate and distinct basis for granting the use variance, as follows:

> The proposed house of worship also promotes the purposes of zoning set forth in N.J.S.A. 40:55D-2. The public interest at stake is manifest; free

> exercise of religion and freedom of worship were recognized by the framers of the Constitution as inalienable rights. The proposed use is clearly in furtherance of the general welfare and contributes to Montclair's goal to continue as a diverse community.

The Board weighed this finding, among others, against the detriment that the proposed use would cause to the neighborhood and zone plan, and found that the religious benefit outweighed the overcrowding, noise and traffic congestion that would result from this use. The Board's reliance on this finding violates the Establishment Clause.

The Board found that the applicant's congregation should be favored over other religious groups, as well as secular groups, because the construction of a new synagogue (for a congregation long established in Montclair) would contribute to Montclair's goal of continuing as a "diverse community." This ruling set up an "affirmative action program" for variance applicants. It gave preference to one religion over others because most existing denominations—being *ipso facto* well represented—would fail to meet such a religious diversity test as the Board framed it.

Even if all religious applicants in town could pass the "diversity" test, it would only increase the unconstitutional advantage given by the Board to religious institutions over secular ones. Thus, the Board erred when it considered the religious "diversity" of the Montclair community when deciding whether to grant or deny this use variance application for a house of worship.

The pitfalls of the Board's involvement in such issues are manifest. If indeed the Board has the power to determine which religious groups are under-represented in Montclair and therefore entitled to special treatment, then it must be concluded that the Board would also have the power to find that another religious group (or the same in a subsequent

application) was adequately accommodated (or even over-represented) in Montclair, and therefore was not entitled to special treatment. Needless to say, if the Board were to exercise this power, the religious community would be the first to complain of a violation of free exercise of religion, and with good reason.

In addition, the Board's religious diversity ruling gives preference to religious uses over secular. No secular group could claim to contribute to religious diversity in Montclair, and it therefore could never receive the special treatment the Board gave this applicant. To redress the imbalance, the Board would have to give similar preference to secular institutions that contribute to diversity in exercising First Amendment rights, such as freedom of speech or assembly. This could produce the anomalous result of favoring variance applications for specialty book stores, art movie theaters and headquarters of fringe political groups, while disfavoring those in the mainstream of expression and ideology.

The Board expressly weighed this congregation's specific religious orientation, along with the other positive criteria, against the detriment that would be caused by the proposed use in this single-family neighborhood. In this manner the Board undeniably gave one religious institution a significant procedural advantage over secular institutions. While the Board purported to advance religious "freedom," in fact it was advancing religion itself.

In constitutional terms "freedom" is the absence of restraint. Yet the Board made no finding that this congregation was being restrained in any way from the free exercise of its religion. Nor did the record contain a scintilla of evidence that the denial of a use variance would have compromised the applicant's free exercise of religion. Thus, when the Board referred to the advancement of "free exercise of religion" it could not be referring to any alleviation of a restraint. And, if the advancement of "free exercise of

religion" is not legally possible under these facts, then the conclusion is inescapable that the Board's finding advances religion itself. This is a patent violation of the Establishment Clause.

In the *Boerne* case (*supra*) this Court held that Congress could not rely upon its authority to enforce the Free Exercise Clause of the First Amendment as a basis for passing RFRA. This was because RFRA sought to provide affirmative protection of religious freedom by regulating activity which, according to applicable court rulings, did not violate the Constitution. Here the Board of Adjustment, which is appointed by the municipal government, did just that. The Board sought to prevent an unconstitutional restraint of free exercise of religion by affording preferential treatment to a congregation which was under no unconstitutional religious restraint.

The record shows that Montclair's zoning ordinances make ample accommodation for religious facilities in appropriate zones, but the applicant had not found property in one of those zones which it both wanted and could afford. The Master Plan and zone ordinance allow houses of worship as permitted conditional uses in six different multi-family, residential-office, and neighborhood-commercial zones. Of the 54 congregations in Montclair, 14 are located in what have evolved into single-family zones but *none* of these required a variance at the time it was constructed. The remaining 42 are located in permitted zones.

The Board made no finding that the applicant had experienced difficulty locating property to purchase in a permitted zone. The record shows that the applicant had no problem that would not be encountered by any religious group, or for that matter any group looking for a place of assembly. The applicant simply preferred to locate in a single-family zone where the ordinances had maintained a quiet

neighborhood with lower real estate prices commensurate with residential use.

Conclusion

For all the foregoing reasons the petition for writ of certiorari should be granted.

ANDRZEJ KUHL
STEPHEN SCHLESINGER
BARBARA SCHLESINGER
MARY ALLEN
ROBERT C. HOLMES
THOMAS KELLY
PATTERSON SMITH
ALICE F. FREED
PATRICK FINNEGAN
CULLEN MCVOY
ELIZABETH MCVOY

Petitioners, *pro s*

APPENDIX A

RESOLUTION OF MONTCLAIR BOARD OF ADJUSTMENT

Filed January, 18, 1995

B'Nai Keshet Montclair Jewish Center
99 South Fullerton Avenue

WHEREAS, B'Nai Keshet Montclair Jewish Center, did make application to the Board of Adjustment of the Township of Montclair to construct an addition to the southerly side of the existing principal building to be utilized for religious services and religious school and related activities with onsite accessory parking on property designated as Lot I in Block 2110 on the Township tax map and located in the R-l One Family Residential Zones and

WHEREAS, the applicant sought site plan approval and variances as follows:

1. A variance pursuant to *N.J.S.A.* 40:55D-70d(1) to allow the proposed use which is not a permitted use in the R-1 zone pursuant to Montclair Code Section 224-36.

2. A variance pursuant to *N.J.S.A.* 40:55D-70c to allow a parking area in the front yard contrary to Montclair Code Section 224-41E.

WHEREAS, the applicant submitted a site plan, floor plan amid details prepared by Nadaskay/Kopelson, Architects, bearing a final revision date of August 31, 1994, and a property survey prepared by Alfred J. Clark, Inc., dated June 11, 1993; and

WHEREAS, this matter came on to be heard at meetings of the Board of Adjustment held on April 20, May 18, June 15, July 20, August 17, September 7, 21, 28, October 12. 19. 26, November 2, 16, 30, December 1, 7, 12, 1994, at which time it was established that notice was properly published and the property owners within 200 feet of the property in

question had been properly served; and

WHEREAS, the Board carefully reviewed the testimony presented and established the following findings:

1. B'Nai Keshet Montclair Jewish Center is a Jewish Reconstructionist Congregation which has been established in the Montclair community for over 15 years and which has lost its lease at the First Baptist Church on Church Street and has outgrown its ability to function in shared rented space. The congregation currently has Saturday morning services from 10:00 am. until 12:00 noon and Friday evening services from 7:30 p.m. until 10:00 p.m. Religious instruction of children occurs on Sunday mornings from 9:00 a.m. until 12:00 noon and on Wednesday afternoon from 4:00 p.m. until 6:00 p.m. The property would also be used for services on holy days, bar mitzvahs, speakers and committee meetings.

2. The applicant proposes an addition which when combined with the existing principal building would create a structure of approximately 12,132 square feet on property which contains 1.4 acres. The property has been used as an art school for over 25 years pursuant to a use variance granted to the Yard School of Art, Inc. by the Board of Adjustment on October 18, 1967.

3. The proposed house of worship is "inherently beneficial" thus satisfying the positive criteria under *N.J.S.A.* 40:55D-70d. *State v. Cameron*, 184 N.J. Super. 66 (Law Div. 1982), aff'd, 189 N.J. Super. 404 (App. Div. 1983), rev'd. on other grounds 100 N.J. 586 (1985); *Kali Bari Temple v. Board of Adj.*, 271 N.J. Super. 241 (App. Div. 1994); *Sugarman v. Township of Teaneck*, 272 N.J. Super. 162 (App. Div. 1994).

4. The proposed house of worship also promotes the purposes of zoning set forth in N.J.S.A. 40:55D-2. The public interest at stake is manifest, free exercise of religion and freedom of worship were recognized by the framers of the Constitution as inalienable rights. The proposed use is

clearly in furtherance of the general welfare and contributes to Montclair's goal to continue as a diverse community.

5. The proposed addition to the southerly side of the existing principal building would result in a combined structure approximately 31.5 feet high, with a linear measurement of 140 feet along South Fullerton and 96 feet facing south. The result would be a combined structure at significant variance with the single-family homes to the north and west. The proposal is out of scale with the general character of the neighborhood recognizing the existence of Hawthorne Towers, a multi-level apartment building adjacent to the subject property as well as a garden apartment complex located catty-corner from the subject lot and St. Luke's Church one block north on South Fullerton Avenue. The proposed combined structure is massive and will have a substantial adverse visual impact on the neighborhood and must be reduced and substantially detached in order to meet the negative criteria.

6. The existing Red Gables building is listed on both the National and State of New Jersey Registers of Historic Places. The Master Plan seeks to preserve the Township's rich and varied architecture so that the historic character of the community is maintained. In this regard, the Board finds the testimony of Jan Hird Pokorny, an expert in historic preservation architecture, presented by the objectors to be persuasive. Mr. Pokorny testified that the structure is a better than typical example of its period and is important because it was designed, built and owned by an important Montclair citizen. Mr. Porkorny argued and the Board concluded that the applicant's proposal was inconsistent with good historic preservation principles in that (1) the proposed addition when attached would be too large relative to the original building covering the entire south facade (2) it would be inappropriately connected to the original structure in such a manner as to fail to distinguish what had been added and (3) it would inappropriately attempt to mimic architectural

details instead of providing compatible details. Consequently, the historical integrity of Red Gables would be severely negatively impacted by the applicant's proposal. The Board finds that an addition of limited size constructed primarily as a separate structure with design, materials and height compatible to. but not mimicking the Red Gables building, would satisfy the negative criteria.

7. The objectors asserted a house of worship at the proposed location would adversely impact neighborhood property values. The Board finds the testimony presented by the objectors in support of this contention as well as the applicant's attempt to refute the assertion. failed adequately to support their conclusions with sufficient credible evidence. The Board finds that based upon existing churches located in R-1 zones, adjacent single-family homes continue to be well maintained and show no substantial adverse impact as to property values.

8. The applicant seeks approval to construct a 52-car parking lot in the front yard contrary to Montclair Code Section 224-41E which prohibits accessory parking areas between the principal building and the street. It is at least arguable that the property's unusual shape and configuration combined with the lawfully existing structure thereon give rise to a hardship. It is also at least arguable that the proposed accessory parking area to be utilized in connection with the inherently beneficial religious use advances the purposes of the Municipal Land Use Law. The scale and location of the applicant's planned parking lot, however, fails to meet the negative criteria thus requiring denial of the variance. The proposed parking area is located at the highly visible corner of South Fullerton Avenue and Hawthorne Place adjacent to a substantial number of single-family homes to the north and west as recognized in the Master Plan. The lighted 52-car parking lot as proposed fails to provide a desirable visual environment. The scale and location of the proposed parking lot is inconsistent with the established single-family

residential character of the neighborhood to the north and west and would have a substantial adverse impact. The intent of the zoning ordinance is clear, visual intrusion and increased noise and activity generated by the parking area as proposed would cause substantial detriment to the neighborhood and run afoul of the intent and purpose of the zone plan and zoning ordinance.

WHEREAS, the Board, based on the foregoing findings, and the additional findings placed on the record on December 12, 1993, concluded that pursuant to the New Jersey Supreme Court case of Sica *v. Board of Adjustment of Tp. of Wall,* 127 N.J. 152 (1992), the proposed religious use is significant and inherently beneficial and promotes the public good of Montclair through implementation of the conditions below, on balance, the grant of the variance would not cause substantial detriment to the public good; and

WHEREAS, the Board, based on the aforementioned findings, concluded that with respect to the front yard parking variance, the applicant failed to prove that the variance could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to *N.J.S.A.* 40:55D-70c(l);

WHEREAS, the Board, based on the aforementioned findings, concluded that with respect to the front yard parking variance, the applicant failed to prove that the benefits of the deviation would substantially outweigh any detriment and failed to prove that the variance could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance pursuant to the requirements of *N.J.S.A.* 40:55D-70c(2);

NOW, THEREFORE, BE IT RESOLVED, by the Board of Adjustment of the Township of Montclair, that the within application of B'Nai Keshet Montclair Jewish Center for a use variance is hereby approved subject to the following

conditions to be addressed as part of a revised site plan:

1. The addition shall be constructed primarily as a separate structure to be located on the northerly portion of the property, and may be minimally connected with the existing building and shall be residential in appearance.

2. The addition shall not greatly exceed 8,000 square feet of floor area (excluding the balcony and basement) so as to be keeping in scale with neighboring homes.

3. The design, materials and height of the addition shall be compatible with, but not mimic, Red Gables.

4. The basement of the addition shall be used for storage only.

5. The ornamental brick wall and corner sitting pavilion along the South Fullerton Avenue frontage of the property shall be restored and preserved.

6. Front yard parking spaces are to be avoided and the applicant shall provide a parking plan showing the maximum number of on-site parking spaces consistent with the minimum negative impact.

7. Non-religious outdoor activities shall be permitted only during daylight hours.

8 Non-religious activities on the subject property shall be limited to no later than 10:00 p.m. on weekdays and 12:00 p.m. on weekends.

NOW, THEREFORE, BE IT FURTHER RESOLVED, by the Board of Adjustment of the Township of Montclair, that the application for a variance to allow front yard parking is hereby denied.

NOW, THEREFORE, BE IT FURTHER RESOLVED, that a copy of this resolution be transmitted to the applicant, Township Manager, Township Council and Township Clerk.

APPENDIX B

RESOLUTION OF MONTCLAIR BOARD OF ADJUSTMENT

Filed July 19, 1995

B'Nai Keshet Montclair Jewish Center
99 South Fullerton Avenue

WHEREAS, B'Nai Keshet Montclair Jewish Center, did make application to the Board of Adjustment of the Township of Montclair to use the existing Red Gables for a house of worship, religious school. administrative and other accessory uses until the new structure is constructed and thereafter to use both for such purposes with on-site accessory parking on property designated as Lot I in Block 2110 on the Township tax map and located in the R-1 One Family Residential Zone; and

WHEREAS, the applicant received approval for a use variance subject to a number of conditions including submission of a revised site plan as well as denial of a front yard parking variance as set forth in a resolution adopted by the Board on January 18, 1995; and

WHEREAS, the applicant submitted architectural plans prepared by Paul Segal Associates, Architects, dated April 25, 1995 and bearing a final revision date of May 17, 1995; engineering plans prepared by Frank H. Lehr Associates, dated April 26, 1995 and bearing a final revision date of May 22, 1995 and a landscape plan prepared by Paul Sionas, Landscape Architect, dated April 26, 1995 and bearing a final revision date of May 31, 1995; and

WHEREAS, the applicant sought variances from N.J.S.A. 40:55D-70c to allow: (1) a front yard setback of 34 feet for the proposed new addition where a minimum of 41.69 feet is required pursuant to Montclair Code Section 224-40B(2) and (2) less than the required fifty parking spaces

required by Montclair Code Section 224-91; and

WHEREAS, this matter came on to be heard at meetings of the Board of Adjustment held on May 17, 22, 31 and June 7, 14, 15, 22, 1995 at which time it was established that notice was properly published and the property owners within 200 feet of the property in question had been properly served; and

WHEREAS, the Board carefully reviewed the testimony presented and established the following findings:

1. The proposed new structure to be located on the northerly portion of the property is designated primarily as a separate building linked to the existing building with an open air pergola with plantings. The design breaks up the massing of the structure into three distinct sections; a sanctuary and kiddush room, a small, recessed connector for prayer preparation, and an administrative wing. The design of the new structure substantially resembles two residential dwellings. The location of the kitchen in the rear of the new structure allows service functions to be hidden from street view. The materials to be used are consistent with the various and diverse architectural elements of the neighborhood. The overall design creates a house of worship that meets the needs of the congregation and is compatible with the residential neighborhood.

2. The square footage of the floor area of the proposed new structure is approximately 7,000 square feet (excluding the balcony and basement) as to be keeping in scale with neighboring structures.

3. The historical integrity of Red Gables is maintained by the applicant's plan. The design, materials, and height of the new addition are compatible with, but do not mimic, Red Gables. The new structure is clearly distinguishable from the existing building, the plan does not involve any structural changes to the exterior of the existing building, and applicant will restore the existing building, which is in need of extensive repair.

4. The applicant stipulated that the basement of the new structure shall be used for storage only.

5. The ornamental brick wall and corner sitting pavilion along the South Fullerton Avenue frontage of the property shall be restored and preserved which will enhance the visual appearance of the property.

6. The landscaping plan subject to the conditions below is "exceptional" and represents an aesthetic benefit to the public. The landscaping will provide appropriate screening of the new structure, air conditioning units, refuse container, and parking area, and will be compatible with the landscaping of the neighborhood. The landscaping plan provides for the preservation of the existing formal garden, the large Copper Beech tree on the corner of South Fullerton Avenue and Hawthorne Place, and numerous other existing plantings. The plan includes a fence and hedge along the property line with Hawthorne Towers that meet the Township's standards and specifications.

7. The lighting plan includes fixtures that are residential in appearance and, subject to the conditions below, will not adversely impact the neighborhood and meet the Township's standards and specifications.

8. A one way traffic pattern through the on-site parking area minimizes the impervious asphalt coverage on the site, minimizes the driveway width, and as revised below, promotes safe ingress to and egress from the site, and promotes safe drop-off and pick-up of children for religious school. The directional signs meet all Township standards and specifications.

9. The applicant seeks approval for a front yard setback variance in connection with the new structure to allow a 34 foot setback from South Fullerton where 41.69 feet is required. This minimal deviation of 7.69 feet will be virtually imperceptible from the street. The new structure has a series of undulations so only a small portion of the new structure's frontage encroaches into the front yard setback, which serves

to break up the massing so as to provide interest and variation to the front view. The property's unusual shape and configuration, especially at its narrowest east-west dimension, combined with the exceptional situation uniquely involving and affecting the lawfully existing structure on the property would result in peculiar and exceptional practical difficulties to the applicant in the design of the new addition on the site. The minimal variance facilitates rear yard parking obviating the need for more intrusive front yard parking. Moreover, the front yard setback variance promotes the purposes of zoning and furthers the inherently beneficial use of the property as a house of worship and religious school by allowing a pedestrian walkway between the parking area and the new addition, which promotes safety and other purposes of zoning. The front yard setback as proposed is consistent with the front yard setbacks in the neighborhood and does not result in substantial detriment to the public good or substantial impairment of the intent and purpose of the zoning plan and ordinance.

10. The applicant seeks approval for a parking area for less than the required 50 cars based upon the applicant's stipulation of not more than 400 persons on site at any one time. The evidence established that the number of spaces in the proposed parking area will meet the usual needs of the congregation for its staff, Saturday morning services, and other activities. Off-site parking for High Holy Day services and other infrequent large events will not cause a substantial detriment to the neighborhood and is in keeping with the practice of most other houses of worship in Montclair. The parking area is designed to be shielded year round from the surrounding residential homes by landscaping and the new structure and the existing building. The unusual shape and configuration of the property and the exceptional situation uniquely involving and affecting the lawfully existing structure on the property are reasons for granting the variance; otherwise, the strict application of the zoning

ordinance would result in peculiar and exceptional practical difficulties to the applicant in the design of a 50 car parking lot. The proposed parking area, as revised below, with angled spaces behind the existing building and 90 degree spaces behind the new structure, is a more attractive site layout than a conforming parking plan, avoids front yard parking, maximizes the light, air and green space on the site, and meets the usual and customary parking needs for the applicant's activities. The reconfigured on-site traffic circulation may necessitate a variance for less than the required four foot parking area setback in the driveway area connecting the two portions of the parking lot, however, such a variance would be de minimis, would be justified by the unusual shape and configuration of the property and the exceptional situation uniquely involving and affecting the lawfully existing structure on the property, as well as the fact that it promotes the inherently beneficial use of the property, and would not result in substantial detriment to the public good or substantial impairment of the intent and purpose of the zone plan and zoning ordinance. The scale and location of the parking area optimizes the number of on-site parking spaces with the minimum negative impact for this site and the neighborhood. Moreover, the variance(s) promote the purposes of zoning and furthers the inherently beneficial use of the property as a house of worship and religious school by promoting safety, beautifying the property, preserving an historic site and is consistent with the Municipal Land Use Law. The parking plan is not inconsistent with the master plan and contributes to Montclair's goal to continue as a diverse community.

11. Use of Red Gables for a house of worship, religious school, administrative and other accessory uses until the new structure is constructed which does not exceed currently available on-site parking as per the ordinance will not negatively impact the neighborhood and will not substantially impair the intent and purpose of the zone plan

and zoning ordinance.

12. All of the findings and conclusions contained in the Board's resolution dated January 18, 1995 are incorporated herein.

WHEREAS, the Board, based on the foregoing findings, concluded that with respect to the front yard setback variance, the applicant proved that: (1) by reason of the exceptional narrowness and shape of the property and the exceptional situation uniquely affecting the lawfully existing historical landmark structure on the site, strict application of the front yard setback requirement would result in peculiar and exceptional practical difficulties and/or undue hardship to the applicant and a variance from such strict application of the regulation would relieve such peculiar and exceptional practical difficulties and/or hardship, in accordance with N.J.S.A. 40:55D-70c(1); (2) and the variance would advance the purposes of the Municipal Land Use Law and the benefits of the variance would substantially outweigh any detriment in accordance with N.J.S.A. 40:55D-70c(2); and (3) the variance would be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance; and

WHEREAS, the Board, based on the foregoing findings, concluded that with respect to the variance for number of parking spaces, the applicant proved that: (1) by reason of the exceptional narrowness and shape of the property and the exceptional situation uniquely affecting the lawfully existing historical landmark structure on the site, strict application of the 50 car parking space requirement would result in peculiar and exceptional practical difficulties and/or undue hardship to the applicant and a variance from such strict application of the regulation would relieve such peculiar and exceptional practical difficulties and/or hardship, in accordance with N.J.S.A. 40:55D-70c(1); (2) the variance would advance the purposes of the Municipal Land Use Law and the benefits of the variance would substantially outweigh any detriments in

accordance with N.J.S.A. 40:55D-70c(2); and (3) the variance could be granted without substantial detriment to the public good and would not substantially impair the intent and purpose of the zone plan and zoning ordinance; and

WHEREAS, the Board, based on the foregoing findings, concluded that the proposed site plan complies with the standards contained in the site plan ordinance and the site plan conditions contained in the Board's January 18, 1995 resolution and can be granted without substantial detriment to the public good and without substantial impairment of the intent and purpose of the zoning plan and zoning ordinance pursuant to N.J.S.A. 40:55D-76(b).

WHEREAS, the Board, based on the foregoing findings, concluded that the request for site plan waivers to use the three existing garage parking spaces and for a minor encroachment of the angled parking spaces into the aisle of the parking area behind Red Gables are reasonable and within the general purpose and intent of the site plan ordinance; literal application of the site plan ordinance is impracticable and would exact undue hardship because of the peculiar shape and narrowness of the property and the existing building on the site.

NOW, THEREFORE, BE IT RESOLVED, that the within application for preliminary and final site plan approval including interim use of Red Gables as described herein and variances to allow less than the required front yard setback, parking area setback if necessary and number of parking spaces and site plan waivers is hereby approved subject to the following conditions:

1. The on-site traffic circulation shall be reversed so that traffic shall enter from South Fullerton Avenue and exit onto Hawthorne Place, with the landscaping at Hawthorne Place to be reconfigured as necessary to provide adequate sight distance while still minimizing the visibility of the parking area, with the exit driveway angled to the east onto Hawthorne Place restricted to right turn only. The applicant

shall maximize the number of parking spaces under the reconfigured circulation which may result in the loss of a few parking spaces, however, at least 28 parking spaces (including three garage spaces) shall be provided.

2. No use of Red Gables that will exceed the currently available on-site parking as per the ordinance, shall occur prior to the construction of the parking area approved herein.

3. There shall be no exterior or interior structural changes to Red Gables beyond ordinary maintenance and repair.

4. Light fixtures near property lines shall incorporate appropriate light shielding so as to minimize spillover onto adjoining properties.

5. The Yard School sign shall be removed.

6. The applicant shall develop and implement a maintenance plan for the stormwater drainage system to ensure its continued functioning.

7. The applicant shall obtain Soil Conservation District certification and comply with all applicable regulations.

8. The applicant shall install and maintain directional arrows in the driveway.

9. The applicant shall comply with the outstanding requirements contained in the Township Engineer's memorandum dated June 6, 1995.

10. The lighting in the parking area shall utilize a timer so that the lights will go off one-half hour after use of the property ends each day.

11. The stormwater drainage system shall be inspected at the end of construction by the Township Engineer and cleaned by the applicant if necessary.

12. Appropriate fencing shall be in place around the dripline of the Copper Beech tree at all times during construction.

13. The applicant shall have an ongoing obligation to replace landscaping which does not survive.

14. The applicant shall install appropriate landscaping

along the entire north side of the new building consisting of approximately one-half evergreen plantings of various species and heights and one-half other suitable plantings which shall be subject to review and approval by the Township Arborist.

15. As stipulated by the applicant, no more than four hundred persons shall be permitted on the property at any one time.

16. The applicant shall install curbing along the southerly property line of Hawthorne Place.

17. The construction details for the exit at Hawthorne Place, including the driveway apron and sidewalk, shall be reviewed by the Township Engineer to prevent an uneven sidewalk.

18. The applicant shall apply yellow paint along the curb at a distance of 5 feet on either side of the driveway at the South Fullerton entrance and the Hawthorne Place exit to discourage on-street parking which may impede the entrance and exit.

19. The applicant shall restore the exterior of Red Gables, perimeter walls and corner sitting pavilion.

20. The Historic Preservation Commission shall review and approve maintenance work on the building as required by the Historic Preservation Ordinance.

21. The applicant shall remove the dirt pile within three months of securing DEP approval which shall be diligently pursued.

22. Garage parking spaces shall be reserved for employees.

23. The applicant shall revise the stormwater drainage plan so as to raise the outlet of inlet seven to the highest elevation feasible; walls or sumps shall be used to maximize detention in the inlets; the four inch pipe on the southerly side of the entrance driveway shall be relocated to the northerly side of the driveway and shall be perforated pipe surrounded by stone.

24. The applicant shall install a trench drain at the end of the driveway joining South Fullerton Avenue.

25. The north and west walls of the new structure shall be designed and constructed to minimize sound impact on the neighbors.

26. The windows facing Hawthorne Place shall be fixed and double-paned.

27. Any of the aforesaid conditions which will necessitate amendment of the plans on file shall require submission to and approval by the Township Engineer without any further submission or reappearance before the Board of Adjustment.

28. The applicant, as stipulated, shall comply with the conditions contained in the resolution of approval adopted by the Board on January 18, 1995.

NOW, THEREFORE, BE IT FURTHER RESOLVED, that a copy of this resolution be transmitted to the applicant, Township Manager, Township Council and Township Clerk.

APPENDIX C

DECISION OF SUPERIOR COURT OF NEW JERSEY

Entered April 10,. 1998

Kuhl et al. v. Township of Montclair et al.
Docket No. ESX-L-2960-95
Docket No. ESX-L-10865-95

This proceeding is an appeal from the resolutions of the Montclair Board Of Adjustment ("Board") adopted after a total of 26 hearings approving a use variance and site plan and other variances sought by the defendant B'Nai Keshet Montclair Jewish Center ("applicant") in order to establish a permanent house of worship.

On November 23, 1993, applicant applied to the Board for a use variance pursuant to N.J.S.A. 40:55D-70(l) to allow a house of worship, religious school and related activities at property located at 99 South Fullerton Avenue at the corner of Hawthorne Place. The property is located in the R-I Zone, in which zone a house of worship is not a permitted use in Montclair. The applicant also sought site plan approval and a variance pursuant to N.J.S.A. 40:55D-70c to allow a placement of a 52 car parking lot in the front yard contrary to Montclair Code Section 224-41E.

Applicant is a nonprofit New Jersey Corporation organized and devoted to religious and educational purposes and is a Jewish Reconstructionist congregation, consisting of 150 families, founded over fifteen years ago by a group of Montclair residents. Over seventy-five percent of the member are Montclair residents. The Congregation has been sharing space in the First Baptist Church Community House in Montclair for the past seven years. The space is insufficient and restricted due to the shared arrangement. As a result, the Congregation engaged in a three-year search for a permanent home for its religious services and religious school. The

search led to the subject property which is the subject matter of this litigation.

The subject property, consisting of approximately 1.4 acres, contains an existing 4,920 square foot (exclusive of attic) structure known as "Red Gables". The Red Gables building was constructed around 1906 and is listed on both the National and State of New Jersey Registers of Historic Places. The property has been used as an art school for over twenty-five years pursuant to a use variance granted to the Yard School of Art, Inc. by the Board on October 18, 1967. At the time of the application to the Board the building was deteriorating and in need of exterior repairs and did not comply with current code requirements, including BOCA, Americans with Disability Act and fire safety.

To the north of the site, South Fullerton Avenue is mixed use, to the south and west of the subject property are single-family homes. The character of Hawthorne Place is mixed residential, including multi-family. Adjacent to the site to the east is Hawthorne Towers, a six story. one hundred thirty-three unit high rise apartment building with a ninety-four car parking lot.

Diagonally across Hawthorne Place is the 38 unit Williamsburg Garden Apartment complex with offices next door. In close proximity to the site are a number of other institutional uses including the Masonic Hall First Congregational Church, Library, Social Agencies Building, Women's Club of Montclair and the St. Luke's Church complex.

The applicant's initial site plan contemplated a 7,212 square foot addition to the southerly side of the existing building which would result in total square footage of 12,132 (exclusive of basement and attic). The applicant stipulated that the attic and basement would not be used for any purposes other than storage. Throughout the proceedings, the applicant sought approval for a sanctuary that would seat a maximum of four hundred people. During the site plan phase,

the applicant formally stipulated that no more than four hundred persons would be permitted on the property at any one time.

The testimony presented below was that the Congregation currently conducts Saturday morning services from 10:00 a.m. to 12:00 noon attended by 30-35 people, except when there are Bar or Bat Mitzvahs when attendance may rise to 100-125. Friday evening services are conducted once a month from 7:30 p.m. to 10:00 p.m. attended by approximately 25 people. Attendance on holidays ranges from 50 to a few hundred.

During the school year, religious instruction of children occurs on Sunday mornings from 9:00 a.m. to 12:00 noon for approximately 50-60 students ages 8 to 13, and from 10:00 a.m. to 12:00 noon for another 50 students ages 4 to 7. On Wednesdays, religious instruction for approximately 50-60 students, ages 8-13, occurs between 4:00 p.m. and 6:00 p.m.

The applicant's traffic expert, Peter Messina, testified that both South Fullerton Avenue and Hawthorne Place are sufficiently wide and adequately lit to allow safe parking of cars on the street. Parking demand for weekly Saturday morning services and monthly Friday evening services would be no more than 15 cars. During the annual three day High Holy Day period when the site might be utilized to its maximum 400, the "worst case" scenario would be parking demand of approximately 125-135 cars. Ample room exists in the area to accommodate easily on street parking of 100 vehicles. The traffic expert testified that such infrequent parking of that number of cars in the street would not have a detrimental impact on the community.

The applicant presented the testimony of a professional planner, Roger DeNiscia. Mr. DeNiscia found the proposed use of the site as a house of worship and to provide religious instruction of children as well as customary ancillary uses was "inherently beneficial". He concluded that approval of the proposed use would not change the character of the area

and would not result in any negative impact. Both planning witnesses called by the Objectors, Dean Boorman and Roy DeBoer, agreed that the proposed use is "inherently beneficial" thus, automatically satisfying the positive criteria for a use variance pursuant to N.J.S.A. 40:55D-70d(l).

The Objectors presented the testimony of a number of witnesses including Jan Hird Pokorny, an expert in historic preservation architecture. Mr. Pokorny testified that the structure is a better than typical example of its period and is important because it was designed, built and owned by an important citizen of Montclair. Mr. Pokorny argued that the applicant's proposal was inconsistent with good historic preservation principles in that the proposed addition (1) when attached would be too large relative to the original building covering the entire south facade, (2) would be inappropriately connected to the original structure in such a manner as to fail to distinguish what has been added and (3) would inappropriately attempt to mimic architectural details instead of providing comparable details.

Many of the neighbors also spoke out against the addition which, when attached to the Yard School building, would result in a structure with a linear measurement of 140 feet along South Fullerton Avenue and 96 feet facing south. While the proposed 7,212 square foot addition was not out of scale with existing properties. the testimony showed that it would be visually too massive if attached directly to the existing Yard School. The Board heard testimony with regard to some of the larger mansions that exist in Montclair including some on South Fullerton that actually exceed in area that of the proposed 12,000 square foot combined structure. Several properties in the immediate area were identified as having 8,000 square foot residences. The proposed 52 car parking lot located in the front yard of a corner lot was of paramount concern. Many neighbors argued the placement of the parking lot would result in an unsatisfactory visual intrusion in the neighborhood.

During the sixteenth meeting on its application, the applicant indicated it would be willing to consider detaching the proposed addition from Red Gables and relocate it to the north and connect it to the existing structure by a small hallway or portico. The applicant also raised the possibility of bifurcating the proceeding to enable the Board to rule on its use variance application and subsequently submitting a new site plan.

At the seventeenth meeting, after hearing negative comments with regard to the site plan. the applicant elected to bifurcate the application. The Board then ruled upon the use variance application.

The Board ruled that the proposed use was inherently beneficial, thus, automatically satisfying the positive criteria pursuant to N.J.S.A. 40:55D-70d(l). The Board went on to find that the proposed house of worship also promotes the purposes of zoning set forth in N.J.S.A. 40:55D-2 as the proposed use is clearly in furtherance of the general welfare. The Board approved the use variance and established various conditions to be addressed as part of the revised site plan in order to reduce the negative impact on the neighborhood as follows:

1. The addition shall be constructed primarily as a separate structure to be located on the northerly portion of the property, and may be minimally connected with the existing building and shall be residential in appearance.

2. The addition shall not greatly exceed 8,000 square feet of floor area (excluding the balcony and basement) so as to be keeping in scale with neighboring homes.

3. The design, materials and height of the addition shall be compatible with, but not mimic, Red Gables.

4. The basement of the addition shall be used for storage only.

5. The ornamental brick wall and corner sitting pavilion along the South Fullerton Avenue frontage of the property shall be restored and preserved.

6. Front yard parking spaces are to be avoided and the applicant shall provide a parking plan showing the maximum number of on-site parking spaces consistent with the minimum negative impact.

7. Non-religious outdoor activities shall be permitted only during daylight hours.

8. Non-religious activities on the subject property shall be limited to no later than 10:00 p.m. on weekdays and 12:00 p.m. on weekends.

The variance request to allow parking in the highly visible front yard as proposed was denied as failing to meet the negative criteria.

The Board adopted a resolution memorializing approval of the use variance and denying the request for front yard parking on January 18, 1995. No action was taken on the site plan. On March 10. 1995 plaintiffs filed a complaint in lieu of prerogative writ, Docket No. ESX-L-2960-95. seeking to reverse the Board's grant of the use variance.

Applicant submitted a revised preliminary site plan to the Board for nonbinding informal discussion pursuant to Montclair Code Section 184-3, which plan was considered at a conceptual hearing held on April 19, 1995. On April 27, 1995, the applicant reapplied for site plan approval and variances to allow (1) a minor deviation from the required front yard setback for the proposed structure and (2) less than the required number of parking spaces.

Under the revised site plan the new structure is to be

situated on the northerly portion of the property and broken up into three distinct sections; a sanctuary and kiddush room, a small connecting link, and an administrative wing which reduces the visual scale of the construction. The kitchen is to be located to the rear to allow service functions to be hidden from the street. The new structure is to be minimally connected to the existing building by an open air trellis arcade.

The landscaping plan provides substantial screening of the new structure, air conditioning units, refuse container and parking area and is compatible with the landscaping of the neighborhood. The landscaping plan provides for the preservation of the existing formal garden, the large copper beech tree on the corner of South Fullerton Avenue and Hawthorne Place, and numerous other plantings.

The design of the new structure, although compatible with, doesn't mimic Red Gables. The materials to be used are consistent with the various and diverse architectural elements of the neighborhood. No structural changes were proposed to Red Gables beyond ordinary maintenance and repair.

The parking lot. which contains less than the required number of parking spaces, is to be relocated to the rear of the property adjacent to Hawthorne Towers with the result that the new building will act to screen the parking from the single-family residences. The relocation of the parking from the front yard was recognized as an improvement by the objectors' planner. The testimony was that there was more than adequate on-site parking provided to accommodate typical parking demand related to religious services, religious school and meetings and that adequate street parking exists in the area to accommodate the shortfall during infrequent special events of High Holy Days so as not to adversely impact the neighborhood. It was further testified to that one-way traffic pattern minimizes conflicts, provides adequate access for emergency vehicles and is common in facilities such as this.

While the facade of the building as a whole complies with the setback, a small portion of the new structure will provide less than the required setback from South Fullerton. Corners of several of projections minimally violate the front yard requirement. According to expert testimony, the minimal deviation will be visually imperceptible from the street with no adverse impact on the neighborhood.

Following eight hearings, on June 22, 1995 the Board commenced its deliberations. The Board reviewed the conditions imposed by the grant of the use variance and determined the site plan complied. The landscaping plan drew praise and was found to be "extraordinary". With respect to the front yard setback variance, the Board found the "minimal variance" would be visually imperceptible from the street and was justified by the narrowing of the property and by the fact that it furthers the inherently beneficial use. The variance for less than the required number of parking spaces was also granted as being justified by the shape of the property and the fact that it results in a "more attractive site layout".

The Board approved the application for site plan approval and bulk variances by a vote of 5 to 1, subject to a number of conditions. One of the conditions, imposed for the benefit of the neighborhood, required reversing the on-site traffic circulation so that traffic will enter from South Fullerton Avenue and exit onto Hawthorne Place with the exit driveway angles to the east. This change will increase site visibility and reduce the visual impact on adjoining properties.

On July 19, 1995 the Board denied as moot plaintiffs' appeal of the zoning officer's decision to allow B'Nai Keshet to occupy two rooms of Red Gables for office use. The denial was memorialized by resolution adopted on August 16, 1995.

On September 8, 1995, plaintiffs filed a complaint in lieu of prerogative writ seeking, inter alia, to reverse the Board's grant of site plan approval and variances, Docket

No. ESX-L-10865-95. This second action was consolidated with the prior appeal pursuant to a pretrial order entered on December 22, 1995.

I

BIFURCATION

Plaintiffs assert that the procedure followed in this case in which applicant bifurcated its joint application for use variance from its applications for site plan approval in the seventeenth meeting of the Board denied plaintiffs due process. Plaintiffs argue that by permitting bifurcation at that juncture the Board had no acceptable site plan before it to grant the use variance and find that the negative criteria if the statute was satisfied. Plaintiffs assert

> "the Board satisfied the negative criteria by creating, in its own mind, an entirely different site plan than the one proposed, and concluding that this imaginary site plan met the negative criteria."

Plaintiffs also allege that the failure to have full site plan before it when it approved the use variance, subject to the applicant's submitting an acceptable plan at a later date, violated procedures under the Municipal Land Use Law citing Field v. Franklin Township. 190 N.J.Super. 326 (App.Div. 1983), cert. denied 5 N.J. 183 (1983). In the Field case the Planning Board granted a preliminary approval of a developer's plan unit development application subject to 21 terms and conditions. The Township Council found that the developer failed to provide sufficient information with regard to feasibility of this three (3) sewerage disposal options. The Law Division held that the action of the Township Council in remanding the matter for further findings on the sewer feasibility issue violated the Municipal Land Use Law. On appeal to the Appellate Division the decision of the trial court was reversed. The question before the Appellate Court was

whether the record before the Township Council was sufficient to justify its conclusion. The appellate court answered that question in the affirmative. It is interesting to note that when the Township Council affirmed the decision of the Planning Board as to other issues that were subject to the fulfillment of certain terms and conditions at some unspecified future time, this decision was upheld by the Appellate Division. Id. at 335. Thus, the Field case, which did not involve granting of a use variance without a full site plan before the Board, is distinguishable.

In Linden Merchants Ass'n v. Linden, 214 N.J.Super. 33 (L.Div. 1986) the applicant applied for a use variance which was bifurcated from the site plan application. The Zoning Board approved the use variance and its decision was affirmed by the City Council, the Law Division and Appellate Division of the Superior Court. After the appeal of the variance had been determined, the Board of Adjustment heard and approved the site plan application. Plaintiff appealed that approval to the City Council which affirmed the Board of Adjustment's action.

Before the Law Division the objectors contended that the various portions of the bifurcated proceedings was for a total project and that in order for there to be a complete variance the entire project had to be totally described and set forth in a site plan. The objectors further contended that site plan approval was part of the variance proceeding.

The trial court rejected the objectors contention and held

> it is clear that for the fact that the approval variances in 1983 was condition upon subsequent site plan approval, the site plan application is a separate application. The site plan proceeding should be governed by law in effect when these proceedings were held in 1985.
>
> [214 N.J.Super. at 39]

N.J.S.A. 40:55D-76b provides that:

> b. The board of adjustment shall have the power to grant, to the same extent and subject to the same restrictions as the planning board, subdivision or site plan approval pursuant to article 6 of this act [40:55D-37 et seq.] or conditional use approval pursuant to section 54 of this act [40:55D-67], whenever the proposed development requires approval by the board of adjustment of a variance pursuant to subsection d. of section 57 of this act. (C. 40:55D-70). The developer may elect to submit a separate application requesting approval of the variance and a subsequent application for any required approval of a subdivision, site plan or conditional use. The separate approval of the variance shall be conditioned upon grant of all required subsequent approvals by the board of adjustment. No such subsequent approval shall be granted unless such approval can be granted without substantial detriment to the public good and without substantial impairment of the. intent and purpose of the zone plan and zoning ordinance.

As originally enacted, the Land Use Law did not specify that the applicant could elect to delay filing the application for subdivision or site plan review until after the decision of the board with respect to the requested use variance. The act now makes it clear that the applicant has the option to submit his application for site plan review or subdivision approval after the decision with respect to the primary application to permit the use variance. N.J.S.A. 40:55D-76b permits consecutive as well as concurrent applications. The board of adjustment may require the applicant to submit at least a minimal site plan to show the board what the proposed use will consist of and the general location of buildings, parking areas and the like.

On the basis of the plan as submitted and the seventeen hearings held, the Board had ample information from which it could understand the nature of the use and its relationship to and potential impact on the neighborhood. Based upon the evidence submitted the Board determined that changes had to be made to the plan and set down conditions which mandated such changes. In approving the variance, the Board was not acting in a vacuum. It was acting against the background of the plan presented and the evidence offered by the applicant and the Objectors. It was able to assess the application, its impact and what had to be done to alleviate the negative impacts.

The concept of "bifurcation" found in N.J.S.A. 40:55 D-76 (b) is for the benefit of the applicant. A Board my approve an application for a use variance accompanied by only a general description of the project and stipulate conditions which would have to be reflected in the site plan. It makes no difference that an applicant starts with a detailed site plan and then submits a revision based upon conditions set down by the Board in approving the variances. The goal is to determine whether the applicant is able to propose a plan which the Board will accept as satisfying the statutory criteria. Russell v. Tenafly, 31 N.J. 58, 66 (1959).

N.J.S.A. 40:55D-76 (b) requires that the "separate approval of the variance be conditioned upon grant of all subsequent approvals." The statute goes on to provide that no "such subsequent approval shall be granted" until the negative criteria are established. The Board may grant the use variance, but nothing is finally approved until the negative criteria have actually been satisfied in the site plan portion. The variance portion analyzed the application in the context of Sica v. Bd. of Adj. of Tp. of Wall, 127 NA. 152 (1992) i.e., what conditions may be imposed which would eliminate the detrimental effects so that the balance would be in favor of the variance. Then, when the site plan incorporating the conditions was approved, the Board found that the negative

criteria had been satisfied as required by the statute. The "bifurcation" procedure adopted by the Board was simply a convenient way of dealing with what had become an unwieldy and overwhelming case. The Board, recognizing that it was dealing with an inherently beneficial use, had concluded that with certain conditions it could agree that the positive aspects of the plan would outweigh the negative. The Board was in no way constrained to approve the revised site plan if it did not conform to the conditions set down in the original approval.

II

SCOPE OF JUDICIAL REVIEW OF ZONING & PLANNING BOARD DECISIONS

The judicial scope of review of a determination made by a Zoning Board or Planning Board is extremely limited. The factual determinations of a Board are presumed to be valid. The question before the Court is whether the Board acted arbitrarily, capriciously or unreasonably in exercising its quasi-judicial function. Kramer v. Bd of Adjust. Sea Girt, 45 N.J. 268 (1965). The party challenging the action of the Board has the burden of proof that the action by the Board was arbitrary and capricious. Rowatti v. Gonchar, 101 N.J. 46 (1985).

A Board's resolution of factual issues must stand if supported by sufficient credible evidence. Rowatti v. Gonchar. supra at 51. The decision of the Board carries with it the presumption of validity and correctness, Ardolino v. Florham Park Bd. of Adj., 24 N.J. 94(1957), which constitutes a recognition of the fact that the Board members are the ones most familiar with the community's characteristics and needs:

> "Such public bodies, because of their peculiar knowledge of local conditions, must be allowed wide latitude of delegated discretion. Courts cannot

> substitute an independent judgment for that of the Board in areas of factual dispute; neither will they exercise or review the original jurisdiction of such Boards or trespass upon their administrative work."
>
> [Kramer v. Bd of Adjust. Sea Girt 45 N.J. at 296]
>
> See also Burbridge v. Mine Hill Tp., 117 N.J. 376, 385 (1990).

The court is not empowered to substitute its independent judgment for that of the Board. Kramer, supra at 296. Medical Realty v. Board of Adjustment, 228 N.J.Super. 226, 233 (App.Div. 1988); see also Kenwood Assocs. v. Board of Adjustment Englewood, 141 N.J.Super, 1, 4 (App. Div. 1976) (citing Stolz v. Ellenstein, 7 N.J. 291 (1951)); Peoples Trust Co. of Bergen County v. Board of Adjustment of Hasbrouck Heights. 60 N.J.Super. 569 (App.Div. 1959).

The reviewing court must determine whether the Board followed the statutory guidelines and properly exercised its discretion. Burbridge v. Minehill Tp., supra. In order to conclude that the Board properly exercised its discretion, the reviewing court must find that there was evidence on the record below upon which the Board based its decision. Kramer, supra at 285. In making its factual determinations, a board will undoubtedly make decisions as to the credibility of witnesses, and those decisions, where reasonably made, are "conclusive on appeal." Id. at 288. This principal applies with respect to expert witnesses as well. The board is free to accept or reject the testimony of an expert as it sees fit and to choose between experts. Allen v. Hopewell Tp. Zoning Bd., 227 N.J.Super. 574, 581 (App.Div. 1988), certif. den. 11 3 N.J. 655 (1988).

The reviewing court may overturn a determination of a board of adjustment only if it finds no basis in the record for the board's conclusions, and/or it determines that the board improperly applied the relevant statutory requirements to the

factual situation. Burbridge v. Mine Hill Tp. supra. at 385. The general nature of the review "of a board's actions is to determine 'whether the board below followed the statutory guidelines and properly exercised its discretion'." Wyzykowski v. Rizas, 132 N.J. 509, 522 (1993). The plaintiffs have the "heavy burden of proving" that the Board's action was arbitrary, capricious or unreasonable, Kenwood Assoc., supra, since, the action of the Board is presumed to be valid. Id., (citing Rexon v. Haddonfield Board of Adjustment, 10 N.J. 1, 7 (1952)); Bove v. Emerson Board of Adjustment, 100 N.J.Super. 95, 101 (App. Div. 1968).

Applicant filed its application pursuant to N.J.S.A. 40:55D-70 (d) which provides:

> "In particular cases and for special reasons [the Board of Adjustments may], grant a variance to allow departure from regulations pursuant to Article 8 of this Act to permit: (1) a use or principal structure in a district restricted against such use or principal structure...
>
> No variance or other relief may be granted under the terms of this section unless such variance or other relief can be granted without substantial detriment to the public good and will not substantially impair the intent and the purposes of the zone plan and zoning ordinance ..." N.J.S.A. 40:55D-70 (d). Emphasis Supplied.

The New Jersey Courts have interpreted this statute as requiring that the applicant must satisfy two separate criteria to be entitled to a subsection "d" use variance. Medici v. BPR Co., 107 N.J. 1, 4 (1987); Burbridge v. Mine Hill Township, 117 N.J. 376 (1990). First, the applicant must show that "special reasons" exist why the Board should grant relief under subsection "d".

"Special reasons" is a flexible concept that exists whenever a variance proposes to secure any of the purposes of zoning listed in N.J.S.A. 40:55D-2. Kessler v. Bowker, 174 N.J.Super. 478, 485 (App.Div. 1979). A court, in reviewing "special reasons" in connection with a "d" variance must look at the entire picture and consider all the reasons in the aggregate and not isolate one reason alone as being legally insufficient. Wichatunk Village, Inc. v. Township of Marlboro, 118 N.J.Super. 445 (Ch. Div. 1972). It is only required that applicant meet one of the purposes of zoning to satisfy the "special reasons" prong of the test, Hudanich v. Avalon, 183 N.J.Super. 244 (L. Div. 1981). To qualify as a "special reason" that "promotes the general welfare", a use must be either inherently beneficial, or particularly suited to the proposed use. Medici v. BPR Co., supra at 18.

Plaintiffs do not challenge the principle that "inherently" beneficial uses are in and of themselves "special reasons" for the grant of variances. Rather, plaintiffs argue that houses of worship are not inherently beneficial uses, and that a finding that it is inherently beneficial would violate the establishment clause of the Constitution, and, therefore the so-called enhanced quality of proof mandated for non-inherently beneficial uses by the Supreme Court in Medici v. BPR Co., supra is applicable to this case. Under the "enhanced" standard, the applicant cannot satisfy the negative criteria unless it can "reconcile the grant of a use variance with the ordinance s continued omission of the proposed use from those permitted in the zone...." 107 N.J. at 4.

Some five years after Medici, in Sica the Supreme Court clarified Medici and stated categorically "that the enhanced standard does not apply to inherently beneficial uses." 127 N.J. at 155. The Court then went on to lay down a four-part process to be employed by a board of adjustment in applying the negative criteria to a use variance application involving

an inherently beneficial use.

First: "[I]dentify the public interest at stake."

Second: "[I]dentify the detrimental effect that will ensue from the grant of the variance." Certain effects, such as increased traffic, will inevitably "attend any non-residential use in a residential zone." Such an effect "need not outweigh an inherently beneficial use that satisfies the positive criteria."

Third: "[R]educe the detrimental effect by imposing reasonable conditions on the use... If so, the weight accorded the adverse effect should be reduced by the anticipated effect of those restrictions.

Fourth: "[W]eigh the positive and negative criteria and determine whether, on balance, the grant of the variance would cause a substantial detriment to the public good." 127 N.J. 165-166.

In the case at bar, the Board found applicant's proposed house of worship use to be "inherently beneficial" and then proceeded to apply the four-part Sica analysis. It imposed a series of conditions and concluded that "through the implementation of the conditions below, on balance, the grant of the variance would not cause substantial detriment to the public good."

House of Worship is an Inherently Beneficial Use

Our courts have spoken to the issue on several occasions and always found houses of worship to be inherently beneficial. In Kali Bari Temple v. Board of Adj., 271 N.J. Super. 241 (App. Div. 1994), the applicant sought a use variance to permit the use of a portion of his home as a place of worship, while retaining the "residence use for the remainder of the house. In denying the application, the board of adjustment found that the proposed use "cannot be classified as inherently beneficial". Id. at p. 246. The Appellate Division reversed, specifically finding that church uses have been found to be inherently beneficial and that they

are "clearly in furtherance of the public morals and general welfare." id at p. 248. The fact that the religious services were to be conducted in a residence in no way altered the "inherently beneficial" determination. Ibid. The nature of the court's finding was further supported by the fact that after finding the use to be inherently beneficial. the court went on to apply the four-part Sica test, a test which only relates to inherently beneficial uses.

Objectors also attempt to distinguish Sugarman v. Township of Teaneck Bd. of Adjustment, 272 N.J. Super. 162 (App. Div. 1994), certif. den. 137 N.J. 310 (1994), on the grounds that the house of worship use in that case was classified as a conditional use in the zone. Since the plan did not conform to the conditional use criteria of the ordinance, application was made for a use variance under N.J.S.A. 40:55D-70d(3). Once the plan did not meet the conditional use criteria it was treated as if it were non-conforming. The board of adjustment found the house of worship to be an inherently beneficial use satisfying the special reasons criterion. Both the Law Division and the Appellate Division affirmed. 272 N.J. Super. p. 172. ("...[T]he Congregation satisfied the 'special reasons' requirement...."); See also State v. Cameron, 184 N.J.Super. 66, 75 (L. Div. 1982), affd, 189 N.J.Super. 404 (App. Div. 1983), rev'd on other grounds 100 N.J. 586 (1985) ("... [R]eligious institutions are beneficial to the public welfare by their very nature...."); Cox, New Jersey Zoning and Land Use Administration (1995) p. 138 ("It has also been noted that churches and other places of worship fall into the category of inherently beneficial.")

No Constitutional Violation in Recognizing House of Worship as Inherently Beneficial Use.

The New Jersey "inherently beneficial use" doctrine as applied in zoning cases relates to both secular and religious uses. That a religious use may satisfy the "inherently beneficial" standard does not disqualify the religious use or

the standard. While religious uses are not to receive special preferential treatment, by the same token they are not to be the targets for discriminatory treatment. In Walz v. Tax Comm'n, 397 U.S. 664 (1970), the United States Supreme Court rejected an "Establishment" challenge to a property tax exemption for real or personal property used for religious, educational or charitable purposes.

Uses which are inherently beneficial are those which promote the general welfare. They may be commercial or non-profit. Such uses include religious schools, senior citizen housing, public housing and telephone towers. Andrews v. Ocean Twp. Board of Adjustment, 30 N.J. 245 (1959); Jayber, Inc. v. Municipal Council, 238 N.J.Super. 165 (App. Div. 1990), certif. den. 122 N.J. 142 (1990); DeSimone v. Greater Englewood Housing Corp. No. 1, 56 N.J. 428 (1970); and Nynex Mob. Comm. Co. v. Hazlet Tp., 276 N.J.Super. 598 (App. Div. 1994). As noted earlier, our courts have repeatedly held that religious uses fall within the same category as they are "clearly in furtherance of the public morals and general welfare." Kali Bari Temple v. Bd. of Adj., supra. at 248. See also the concurring opinion of Justice Clifford in State v. Cameron, 100 N.J. 586, 606 (1985) that "courts have held that religious activity itself is in furtherance of public morals and general welfare."

Identifying the general welfare benefits of religious uses and according such uses the same benefits as are granted other inherently beneficial uses in no way violates either the United States or the New Jersey Constitutions. The recognition that, because they further the express purpose of New Jersey zoning of promoting "morals" and "general welfare" (N.J.S.A. 40:55D-2(a)), religious institutions are entitled to the very same treatment as other uses which further the same goals, in no way establishes or unconstitutionally favors the religious uses.

Objectors particularly point to the reference in the fourth finding of the Board's resolution of January 18, 1995 to

"Montclair's goal to continue as a diverse community." They argue that this amounts to favoring one religious group over another. The Board's actions in recognizing this religious group's needs are in no way in derogation of the needs of any other religious group. No other religious group is being deprived of anything by the grant of the approvals to the instant applicant.

It is perfectly legitimate for a board of adjustment to recognize the needs of a particular user, religious or secular, and its place within the community. In Andrews v. Ocean Twp. Board of Adjustment, 30 N.J. 245 (1959), a Catholic parochial school sought a variance for the construction of a new building in order to alleviate overcrowding. The Supreme Court "found it indisputable that the education of children furthered the general welfare and that a need existed for additional parochial schools within the community." Burbridge v. Mine Hill Tp., supra at 394.

In State v. Cameron, supra., Justice Clifford stated in his concurring opinion:

> [T]he Supreme Court echoed Justice Douglas' observation that '[w]e are a religious people whose institutions presuppose a Supreme Being.'... The Court reminded us of the rich diversity of our religious beliefs, and that by accommodating all forms of religious expression, 'governmental action has "follow[ed] the best of our traditions" and "respect[ed] the religious nature of our people".'
>
> [Cameron, supra, 100 N.J. at 609 (Clifford, J. concurring) (quoting Lynch v. Donnelly, 465 U.S. 668 (1984).)]

Objectors raise the constitutional argument of "undue entanglement" with respect to the condition imposed in the first resolution setting time limitations of 10:00 p.m. on weekdays and 12:00 p.m. on weekends for non-religious activities. Objectors argues that this condition imposes upon

the municipal zoning officer the responsibility of determining what is religious activity. However, the condition is only one of a total of 36 conditions imposed by the Board in its two resolutions and was included only because the applicant volunteered the limitation. Speculation as to the validity of any defenses that might be raised to any future enforcement proceeding does not invalidate this facially valid agreed to limitation of use. Orloski v. Borough of Ship Bottom, 226 N.J.Super. 666, 677-679 (L.Div. 1988), affd 234 N.J.Super. 1 (App.Div. 1989).

The Board Properly Applied Sica

Sica created a four part test to be employed in applying the negative criteria to an inherently beneficial use. The Board applied that test to the application before it.

a) Identify public interest - The Board found as follows with respect to the proposed use:

(i) The proposed house of worship is inherently beneficial.

(ii) The proposed house of worship is in furtherance of the general welfare and promotes purposes of zoning set forth in the Municipal Land Use Law.

(iii) Free exercise of religion is the public interest which is at stake.

(iv) The Montclair Master Plan "seeks to preserve the Township's rich and varied architecture so that the historic character of the community is maintained."

b) Identify detrimental effects - The Board found several detrimental effects in the plan as originally presented:

(i) The new structure as originally proposed "is massive and will have a substantial adverse

visual impact on the neighborhood and must be reduced and substantially detached...."

(ii) The new structure as originally proposed is "inconsistent with good historic preservation principles" in that it would be too large relative to the original building, it fails to distinguish what had been added and it would inappropriately "mimic architectural details instead of providing compatible details."

(iii) "The scale and location of the proposed parking lot is inconsistent with the established single-family residential character of the neighborhood to the north and west...."

Having fully-complied with the first two parts of the Sica test, the Board then proceeded to the third part which is to "reduce the detrimental effect by imposing reasonable conditions." The Board imposed a series of conditions which were to be "addressed as part of a revised site plan." In the main, these conditions were aimed at addressing the specific detriments identified by the Board while complying with part 2 of Sica. These conditions include the following:

(i) The addition is to be located on the northerly portion of the property, residential in appearance and "minimally connected" with the existing building.

(ii) Addition is not greatly to exceed 8,000 square feet of floor area.

(iii) The design, materials and height of addition are to "be compatible with, but not mimic" the existing building.

(iv) Front yard parking is to be avoided.

Based upon these and the other conditions set forth in

the resolution, the Board concluded it could grant the use variance, that is that the negative criteria would be satisfied. The Board clearly found that, once the conditions were addressed to its satisfaction in a revised site plan, the adverse effects of the plan would be reduced, and, therefore, under part 4 of Sica, on balance, the grant of the variance would not cause a substantial detriment to the public good.

In accordance with the directions of the Board, the applicant submitted a revised site plan which addressed those conditions set down by the Board which were aimed at reducing the detrimental effects of the original proposal. In its Resolution of June 22, 1995 approving the revised site plan, the Board found that the applicant had indeed satisfied the Board's conditions and thereby reduced the detrimental effects:

(i) The design of the new building breaks up the massing of the structure, resembles two residential dwellings and is compatible and in scale with a residential neighborhood and neighboring structures.

(ii) The design, materials and height of the new addition are compatible with but do not mimic the existing historic building.

(iii) The proposed parking "is a more attractive site layout than a conforming parking plan, avoids front yard parking, maximizes the height, air and green space on the site" and "optimizes the number of on-site parking spaces with the minimum negative impact....

The Board's Findings Were Based Upon Credible Evidence in the Record

The findings made by the Board in its first resolution are essentially consistent with the testimony provided by

Objectors. The Objectors own witnesses confirmed that the use is inherently beneficial. Further, it was the Objectors' expert in historic preservation, Mr. Pokorny, who testified that the plan was inconsistent with historic preservation principles in three respects:

(i) The proposed addition when attached would be too large relative to the existing Yard School;

(ii) The proposed building would be inappropriately connected to the original structure; and

(iii) The proposed building would inappropriately attempt to mimic architectural details. Various neighbors argued that the placement of the parking lot in the front yard was the "single most objectionable part of the application."

The Board considered all of this testimony and, while approving the variance, laid down the conditions previously described which were aimed at ameliorating the negative effects identified by Objectors and their witnesses.

During the site plan consideration proceedings, the applicant presented the testimony of an architect, who is also an expert in the adaptive reuse of historic buildings, to the effect that the new site plan being presented addressed the very issues identified by Objectors and their witnesses. In particular, the new design will:

a) Separate the new building from the existing Yard School with the result that the "mass" will have been broken up and a size similar in scale and character to the neighborhood will have been achieved;

b) Parking will be screened from the neighborhood by the buildings on the site;

c) Materials will be consistent with those used in the neighborhood; and

d) The new building would not be as high as the existing Yard School structure.

The Board had ample testimony in the record on which to base its conclusions that, with mitigation of the negative effects identified by Objectors and their experts, the use variance and site plan could be approved without substantial detriment to the public good. These conclusions were not arbitrary or capricious and are not subject to reversal, even if another fact-finder might have reached a different result. Burbridge v. Mine Hill Tp., 117 N.J. at 385; Rowatti v. Gonchar, 101 N.J. at 51-52.

III

THE GRANT OF THE PARKING VARIANCE WAS SUPPORTED BY SUBSTANTIAL CREDIBLE EVIDENCE IN THE RECORD AND SATISFIED THE STATUTORY CRITERIA.

While the standard of review of the grant of bulk variances is the same as that for the grant of use variances, the standards for grant of the variance differ. Pursuant to N.J.S.A. 55D-70c, the grant of a bulk variance is authorized (i) upon the finding of hardship arising out of specific physical characteristics of the property involved or the structures existing on the property or (ii) where the purposes of the Municipal Land Use Law would be advanced by a deviation from the zoning requirements and the benefits of such deviation would outweigh any detriment. In both cases, however, the negative criteria must nevertheless be satisfied. In the instant case, the Board found that the requested variances for reduced parking was justified under both of the standards.

C(1) Variance

N.J.S.A. 50:55D-70c was amended in 1985 in recognition of the fact "that hardship can be created not only by the physical characteristics of the land, but by reason of the existence of a structure already located on it which may create an 'exceptional situation' sufficient to justify a zoning variance." Cox, supra, at p. 91.

In the instant case, the Red Gables is a historic site. It is in deteriorating condition. It has been on the market for six years with no takers. Several of the Objectors had themselves previously considered but then rejected purchasing the property. The applicant's plan provides a means of preserving the historic structure.

Applicant's revised site plan provided for a total of 31 parking spaces, in lieu of the 50 required by the local ordinance. The traffic report and testimony presented by applicant showed that, except for the High Holy Days and special events, e.g., the occasional Bar or Bat Mitzvah, the 31 on-site spaces will be more than adequate to serve the Congregation's requirements. Based upon the evidence presented, the Board found that the "[o]ff-site parking for High Holy Day services and other infrequent large events will not cause a substantial detriment to the neighborhood and is in keeping with the practice of most of the houses of worship in Montclair."

As justification for the grant of the variances under c(i), the "hardship" standard, the Board pointed the following:

1. The unusual shape and configuration of the seven-sided lot with its inconsistent depths and corners at odd angles.

2. The exceptional situation "uniquely involving and affecting" the existing Yard School building.

The Board concluded that, in light of these

circumstances, "strict application of the zoning ordinance would result in peculiar and exceptional practical difficulties to the applicant in the design of a 50 car parking lot."

This is precisely the type of situation contemplated by the language of the statute referring to an "exceptional situation uniquely affecting... structures lawfully existing thereon." See J Hawryla vs. Board Adjustment, 249 N.J. Super. 568 (App. Div. 1991), in which a bulk variance was upheld in order to preserve a unique foundation. In the instance case, the alternative to allowing some deviation would likely be the continued deterioration and decay of the Red Gables leading to its ultimate destruction, or at the least a major change in the historic structure. The constraints imposed on preserving the building in its existing form provide the basis for granting the variance.

Objectors' arguments that the C(1) variance is inapplicable to this case because the hardship is "self-created" and because other lots in the area contain historical structures and cannot accommodate 50 car parking lots are without substance. First, the obtaining of a use variance does not constitute a self-created hardship, rather it establishes the approved use as permitted at the location. The bulk limitations on the implementations of the newly permitted use must then be analyzed in the same manner as they would be analyzed in the case of a use permitted by ordinance.

Second, Objectors argue that the lot is "too small" to accommodate parking for 50 cars. The original site plan submitted by Congregation provided for a 52-car parking lot. That plan was rejected because of the location which was found to have a detrimental effect on the neighborhood and because, in light of the testimony presented, the proposed number of spaces was found to be excessive. The parking area was reduced in size and relocated in order to meet objections raised by Objectors.

The northern end of the property was rejected for the parking area by the Board when granting the use variance.

The parking cannot be located on the southern end because that would necessitate razing Red Gables, a historic site. The limitation established by the Board in connection with the use variance and the historic designation of Red Gables combine to create "an extraordinary and exceptional situation uniquely affecting" the only property in the area approved for a house of worship use and "the structures" thereon. The effect of these circumstances need not result in the inability to make any use of the property. Rather, a variance may be granted if the limitations inhibit the extent of a lawful use of the property. Kaufmann v. Planning Bd. for Warren Twp., 110 N.J. 551, 562 (1988); Bressman v. Gash, 131 N.J. 517 (1993).

C(2) Variance

With respect to C(2) standard, i.e. advancing the purposes of zoning, the Board noted the following:

> 1. The proposed plan is more attractive than a conforming plan, avoids front yard parking, maximizes light, air and green space on the site.
>
> 2. The variance furthers the inherent beneficial use of the site, promotes safety, beautifies the property and results in the preservation of a decaying historic site.

Objectors argue that the standards for the C(2) variance have not been met. Objectors contend that the grant of the parking variance will not be in conformity with Montclair's "community development plans" since those plans "are that religious institutions not be allowed in the R-l zone."

We begin with the fact that the Board approved the use by its Resolution 4, January 18. 1995. It is against the background of the newly-permitted use that the parking variance is to be analyzed in terms of its furtherance of the purposes of zoning and whether it presents a better zoning

and planning alternative for the property which will benefit the community. Kaufmann v.Planning Bd. for Warren Tp., supra at 563. The Board identified the various specific purposes of zoning that are addressed by the parking plan and the manner in which those purposes present a better zoning alternative for the lot on which the house of worship is to be located as opposed to requiring adherence to the 50-car standard:

> 1. Parking Plan "maximizes the light, air and green space on the site."
>
> "[P]rovide adequate light, air and open space." N.J.S.A. 40:55D-2c.
>
> 2. The landscaping plan resulting from the parking lay-out is "exceptional," "represents an aesthetic benefit to the public" and "will provide appropriate screening of the new structure, air conditioning units, refuse container, and parking area...." - Promote "a desirable visual environment." N.J.S.A. 40:55D-2i.
>
> 3. "The historical integrity of Red Gables is maintained" by the overall site plan including parking -"[P]romote the conservation of historic sites." N.J.S.A. 40:55D-2j.

See Commercial Realty v. First Atlantic, 235 N.J. Super. 577 (App. Div. 1989), affd 122 N.J. 546 (1991), in which a reduction in parking spaces to the number actually shown to be required was approved as a means of providing landscaping.

Based upon the record before it, the Board properly concluded that the revised parking plan would permit the promotion of morals, and general welfare", i.e. the house of worship, in a land use configuration that would present a

better zoning alternative for the community than would insistence upon 50 parking spaces.

Negative Criteria

Objectors argue that the Board approved a "site plan with essentially no off-street parking....". In fact, against a code requirement of 50 spaces, the Board approved a plan with 31 spaces. The evidence presented showed that the parking provided "will meet the usual needs of the congregation and its staff." There is available on-street parking for unusual situations which would accommodate the shortfall of 19 spaces as well as any additional required parking beyond the ordinance standard. In any event, such on street parking would be limited to a few hours on a few days out of the entire year, and such use of on street parking "is in keeping with the practice of most other houses of worship in Montclair."

Based upon the record before it, the Board had ample basis for concluding that the variance for reduced parking could be granted without substantial detriment to the neighboring area.

III

SUBJECT MATTER JURISDICTION

Plaintiffs filed a Complaint in Lieu of Prerogative Writ following the adoption of the January 18,1995 resolution approving the use variance. At the commencement of the site plan hearing, May 17,1995 Objectors challenged the jurisdiction of the Board to consider the application, citing the pending Superior Court action. The Board rejected the challenge, but the Board attorney advised them that they had the right to seek a stay from the courts. Objectors never sought such relief.

Objector's have raised the jurisdictional argument in this action, citing Kramer v. Bd. of Adjust. Sea Girt, 80

N.J.Super. 454 (L.Div. 1963), affd on other grounds, 45 N. 268 (1965); Morton v. Mayor & Council of Tp. of Clark, 102 N.J.Super. 84 (L.Div. 1968), affd, 108 N.J.Super. 74 (App.Div. 1969) and Orloski v. Borough of Ship Bottom, 226 N.J.Super. 666 (L.Div. 1988). There are indeed many situations in which the pendency of an appeal deprives a lower court of jurisdiction to act further in the matter under appeal. The purpose of such a rule is to prevent the lower court from doing anything which will adversely affect the power of the reviewing court to reverse or modify the order or judgment which is the subject of the appeal. The rule serves the obvious purposes of promoting judicial efficiency and avoiding inconsistent and duplicative proceedings. However, in those cases in which the proceeding before the original tribunal involves a matter which is separate and distinct from the issue on appeal, the original tribunal is not divested of jurisdiction. Carlucci v. Carlucci, 265 N.J.Super. 333 (Ch. Div. 1993). If the new issue presented to the original tribunal "does not have the capacity to affect (i.e. render moot) the pending appeal, it is a 'new case' and the pending appeal (of an unrelated 'case') does not preclude the trial court from considering the 'new case'." Id. at p. 339.

Each of the cases cited by Objectors involved attempts by the original tribunal to modify the very decision which was then the subject of the appeal. In known the Board of Adjustment "revoted" on the very same resolution which was then the subject of an appeal. In her motion the township council adopted a resolution approving a variance, and then, during the pendency of an appeal, rescinded the grant of the variance. In Orloski the plaintiffs had been denied subdivision approval, appealed from such denial, and, while such application was pending, filed another subdivision application.

The first prerogative writ action filed by Objectors related to the variance application. The second proceeding related to the site plan. The final site plan was not before the

Board when it approved the variance and so could not be implicated in the appeal from the first resolution.

N.J.S.A. 40:55D-1 7f. which stays proceedings in the limited case of an appeal to the governing body is an exception to the general rule that appeals from actions of planning boards and boards of adjustment do not create an automatic stay. The general rule is that, in the absence of a judicial stay, a successful applicant before a board may obtain a building permit and proceed with its project at its own risk, notwithstanding the pendency of an appeal to the Superior Court. Only in the case of an appeal to the governing body does the automatic stay come into effect.

IV

AN INFORMAL REVIEW OF THE SITE PLAN

On April 19, 1995, in compliance with the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq., the Board met with representatives of the applicant in an informal review of the proposed site plan. In presenting its drawings to the board in the informal review, applicant was not seeking approval. It was only seeking comment. Objectors argue that this proceeding constituted an "advisory" proceeding and that the Board was unable to make an impartial decision because it is somehow affected by the informal review hearings.

Such informal reviews are specifically contemplated by the Municipal Land Use Law and are common every-day occurrences in this State. N.J.S.A. 40:55D-10.1 provides in part as follows:

> At the request of the developer, the planning board shall grant an informal review of a concept plan for a development which the developer intends to prepare and submit an application for development...

In the instant case, the Board of Adjustment was acting

with the same powers as a planning board with respect to the site plan aspects of the application.

> The board of adjustment shall have the power to grant, to the same extent and subject to the same restrictions of the planning board, subdivision or site plan approval pursuant to Article 6 of this act...whenever the proposed development requires approval by the board of adjustment of a variance pursuant to subsection d of section 57 of this act (C. 4D:55D-70). (Emphasis added.) N.J.S.A. 40:55D-76(b).

Further, the review was specifically authorized under the provisions of Section 184 of the Montclair Code.

In Cox. New Jersey Zoning and Land Use Administrative Law, (1995) p. 270 the author states:

> While boards of adjustment have traditionally had site plans submitted to them in connection with such variances they were not submitted pursuant to the requirements of a local ordinance, so that the board did not become involved in having to check all the requirements of the ordinance against the papers submitted. In the last few years, it has become necessary for boards of adjustment to become used to dealing with site plans on the basis of formal submissions pursuant to local ordinances. Since most planning boards refer all site plan applications to their planner for review and report, and also to such other officials as the municipal engineer, and planning board attorney for their review and recommendations, many zoning boards of adjustment have adopted the policy of handling all such applications in the same way as they are handled by the planning board. such a procedure is highly desirable and since zoning boards of adjustment lack the expertise of planning boards in

> dealing with such applications, it is strongly recommended that this procedure be followed.

This Court concludes that when a site plan application is properly before a board of adjustment, the board has the same power as a planning board to informally review" a concept plan for a development."

V

RECUSAL OF THE BOARD CHAIRMAN

At the meeting held on April 19, 1995, prior to consideration of the applicant's site plan application, plaintiff Robert Holmes requested Board Chairman William Harrison recuse himself. Mr. Holmes alleged that Mr. Harrison "actively participated" in the Administrative Zoning Officer's determination that the applicant could utilize Red Gables for limited office use and storage. Mr. Holmes conceded he had no first hand knowledge of any such "active participation". Instead, the basis for the claim seems to be a reference to a third party discussion made in a correspondence from the co-president of the applicant to Michael LaPlace, Assistant Planner.

The concern was addressed unequivocally by Chairman Harrison:

> Just so the record's clear, I had no discussions with Mr. LaPlace concerning any decision he made. I did not even know he made a decision until I read, I guess it was last week's Montclair Times, or the week before's Montclair Times. I didn't even know he had rendered a decision related to Red Gables. Ms. Kadus did call me, not for, and informed me what had been done. I did, at no point did I advise her as to what course of action that she should take concerning the request that had been made or even Mr. Sullivan as to what I should do.

* * *

I did not give any approval.

The request for recusal was again made by Mr. Holmes at the public hearing on the appeal from the Administrative Zoning Officer's decision. Again, Mr. Harrison indicated he did not give any advice whatsoever with respect to this issue.

N.J.S.A. 40:55D-69 governs conflicts of interest in the context of a Zoning Board of Adjustment and provides "[n]o member of the board of adjustment shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest". Under the common law a public official is disqualified from participating in quasi-judicial proceedings in which the official has a conflicting interest that may interfere with the impartial performance of his duties as a member of the public body. Wyzykowski v. Rizas, 132 N.J. 509, 523 (1993); Petrick v. Plan Bd. of Jersey City, 287 N.J.Super. 325 (App.Div. 1996).

"The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case". Van Itallie v. Franklin Lakes, 28 N.J. 258, 268 (1958) (citing Aldom v. Borough of Roseland, 42 N.C. Super. 495, 503 (App. Div. 1956)). "The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty". Van Itallie, supra, 28 N.C. at 268.

> Local governments would be seriously handicapped if every possible interest, no matter how remote and speculative, would serve as a disqualification of an official. If this were so, it would discourage capable men and women from holding public office. Of course, courts should scrutinize the circumstances with great care and should condemn anything which indicates the

> likelihood of corruption or favoritism. But in doing so they must also be mindful that to abrogate a municipal action at the suggestion that some remote and nebulous interest is present, would be to unjustifiably deprive a municipality in many important instances of the services of its duly elected or appointed officials. The determinations of municipal officials should not be approached with a general feeling of suspicion, for as Justice Holmes has said, "universal distrust creates universal incompetency".
>
> Graham v. United States, 231 U.S. 474, 480 (1913).

The only discussion by anybody with first hand knowledge as to what occurred was Chairman Harrison's clear and unequivocal denial of any participation in the decision of the Administrative Zoning Officer. The double-hearsay relied upon by Mr. Holmes is insufficient in this case to show Mr. Harrison departed from his sworn public duty in reviewing the site plan application and appeal regarding the use of the property.

VI

APPEAL FROM THE DECISION OF THE ZONING OFFICER WAS MOOT

Subsequent to the Board's grant of the use variance on December 12, 1994 to B'Nai Keshet. Applicant sought permission to utilize two rooms in the existing Yard School for office use and in addition storage of materials. The proposed office use would be a continuation of the prior office use of the premises by the Yard School. No structural alterations were proposed to the existing building and permission was granted by the Administrative Zoning Officer on December 22 and February 14, 1995.

By letter dated March 23, 1995, Robert Holmes wrote to the Administrative Zoning Officer and advised that he

believed the limited office use was "not authorized" since: "...a revised site plan has not been submitted, let alone approved. Without an approved site plan, the B'Nai Keshet 'use' variance is a nullity". On April 4, 1995 plaintiffs Robert Holmes, et al. filed an appeal of the Administrative Zoning Officer's decision to allow the aforementioned limited use.

On June 22, 1995, the Board granted applicant site plan approval and the right to use the existing Yard School for a house of worship, religious school, administrative and other accessory uses until the new structure is constructed and thereafter to use both for such purposes with on-site accessory parking. The resolution memorializing the approval adopted by the Board on July 19, 1995 conditioned said approval as follows:

> 2. No use of Red Gables that will exceed the currently available onsite parking as per the ordinance, shall occur prior to the construction of the parking area approved herein.

Following its adoption of the site plan resolution which specifically provided for limited interim use, the Board properly dismissed as moot the appeal of the Administrative Zoning Officer's earlier decision to allow the limited use of Red Gables. This action was memorialized by resolution of the Board adopted on August 16, 1995.

CONCLUSION

The Board devoted 26 hearings to the instant application. The Board heard extensive testimony presented on behalf of the applicant and the Objectors. No limitation was placed on the Objectors' opportunity to express their opposition to the plan. After full and fair hearings, the Board adopted a carefully thought-out resolution which documented the Board's reasoning in granting the approvals. That reasoning was fully in accord with the statutory requirements and the evidence presented, and, under the standards of

review applicable to this type of case, must be affirmed by this Court.

For the reasons set forth in its opinion the Court will grant judgment to defendants and dismiss all challenges by Objectors to the action of the Board in connection with applicant's application for a use variance, site plan approval and bulk variances.

Respectfully,

Alvin Weiss, A.J.S.C.

APPENDIX D

DECISION OF SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION

Entered November 25, 1997

Kuhl et al., plaintiffs-Appellants Docket No. A-5987-95T1
v.
Township of Montclair of Montclair, et al.
Defendants-Respondents

PER CURIAM

Plaintiffs have challenged the Board of Adjustment of the Township of Montclair's grant of a use variance which was followed by the grant of site-plan approval and two "c" variances to defendant, B'Nai Keshet Montclair Jewish Center (Center) plaintiffs' Complaints in Lieu of Prerogative Writs were heard together on March 27, 1996, by the Honorable Alvin Weiss, J.S.C. On April 10, 1996, the judge delivered his opinion affirming the Board's procedures and grants. He thereafter entered judgment dismissing the complaints. Plaintiffs appeal.

Judge Weiss' opinion accurately summarizes the testimony and evidence before the Board, and, therefore, we do not recite the facts. Further, the judge thoroughly discussed the issues presented and correctly decided them. Thus, we affirm the judgment dismissing the complaints, substantially for the reasons Judge Weiss expressed in his opinion.

The contention that houses of worship should not be treated as inherently beneficial uses is without merit. There is direct benefit to the general population from the proposed facility. That it may be run by a religious organization does not detract from the inherent benefits it provides by promoting the morals and general welfare of the community.

Kali Bari Temple v. Redington Township Bd. of Adjustment, 271 N.J. Super. 241, 248 (1994). The cases relied on by the Board and Judge Weiss demonstrate that religious facilities are properly placed in the inherently beneficial category. Sugarman v. Teaneck Township, 272 N.J. Super. 162, 172 (App. Div.), certif. denied, 137 N.J. 310 (1994); Kali Bari Temple, supra, 271 N.J. Super. at 248-49; State v. Cameron, 184 N.J. Super. 66, 75 (Law Div. 1982), aff'd, 189 N.J. Super. 404 (App. Div. 1983), rev'd on other grounds, 100 N.J. 586 (1985).

Plaintiffs also contend that Montclair is adequately zoned for houses of worship by permitting them as a conditional use in most zones, and that the Center could have purchased property in one of those zones. However, the record supports the finding that the Center made an exhaustive search for a facility. It being the only reconstructionist Jewish congregation in the area, existing facilities were not compatible with the beliefs of its members. Property that came on the market after the Center signed the contract to purchase the site in question cannot be considered, as it would force the Center to refrain from fulfilling its contractual obligations. Other potential buildings were either too expensive or would not meet the congregation's needs.

There is no basis for plaintiffs' contention that granting the variance violates the establishment clause. The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The standard for determining application of the Establishment Clause is the following three-prong test of Lemon v. Kurtzman, 403 U.S. 602, 612, 91 S. Ct. 2105, 29 L.Ed.2d 745, 755 (1971) : (1) whether the challenged law or conduct has a secular purpose; (2) whether its principal or primary effect is to advance or inhibit religion; and (3) whether it excessively entangles government with religion. See Ran-Day's County Kosher,

Inc. v. State, 129 N.J. 141, 152 (1992), cert. denied, 507 U.S. 952, 113 S. Ct. 1366, 122 L.Ed.2d 744 (1993).

We find no treatment afforded the Center that would not similarly and typically have been granted other non-profit uses. See Walz v. Tax Comm'n of New York, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (statute exempting from real property taxes realty owned by association organized exclusively for religious purposes does not violate establishment clause as other organizations such as hospitals and libraries receive similar treatment); Rosenberger v. University of Virginia, 515 U.S. 819, 115 S. Ct. 2510, 132 L. Ed. 2d 700 (1995) (holding that State-affiliated university did not violate Establishment Clause by assisting and funding campus religious organization as similar nonreligious organizations are comparably treated).

Plaintiffs have no cause to object to the resolution merely because it conditions the hours during which the Center could use the premises for non-religious activity. Moreover, we see no violation of the Lemon prohibition against excessive government entanglement with religion. See Agostini v. Felton, ___ S.C. ___ (66 U.S.L.W. 3253) Oct. 6, 1997 (noting that interaction between church and state is inevitable and as a result, some level of involvement between the two will be tolerated under the Establishment Clause so long as it is not 'excessive'). Government will often make a judgment as to whether a practice is religious. For instance, the State exempts from taxation property used for religious purposes, N.J.S.A. 54:4-3.6, and courts may have to determine whether property owned by a church is being used for religious purposes. See, e.g., Goodwill Home & Missions, Inc. v. Garwood Borough, 281 N.J. Super. 596, 600 (App. Div.), appeal dismissed, 143 N.J. 317 (1995).

The Board's grant of a variance is presumed valid and it may be set aside only upon a showing that it was arbitrary, unreasonable or capricious. Kramer v. Board of Adjustment of Sea Girt, 45 N.J. 268, 296 (1965) ; Pullen v. South

Plainfield Planning Board, 291 N.J. Super. 1, 6 (App. Div. 1996) "Underlying the presumption is the recognition that such boards possess special knowledge of local conditions and must be accorded wide latitude in the exercise of their discretion." Sica v. Board of Adjustment of Township of Wall, 127 N.J. 152, 167 (1992). The Board's factual findings and conclusions are entitled to great weight and may not be disturbed if supported by sufficient credible evidence in the record. Rowatti v. Gonchar, 101 N.J. 46, 52 (1985); Pullen, supra, 291 N.J. Super. at 7. Its acceptance or rejection of either lay or expert testimony is binding on appeal, if reasonably made. Shim v. Washington Township Planning Bd., 298 N.J. Super. 395, 412 (App. Div. 1997); Hawrylo v. Board of Adjustment of Harding Township, 249 N.J. Super. 568, 579 (App. Div. 1991).

A variance for a house of worship in a residential zone is governed by N.J.S.A. 40:55D-70(d) (1), which gives boards the discretion to grant a variance to permit "a use in a district restricted against such use" upon a showing of special reasons and satisfaction of the negative criteria. There are two prongs to the negative criteria: (1) the variance can be granted without substantial detriment to the public good, and (2) the variance will not substantially impair the intent and the purpose of the zone plan and zoning ordinance. N.J.S.A. 40:55D-70(d). The public good prong requires the board to carefully weigh the impact of the variance on the neighborhood. Chirichello v. Zoning Board of Adjustment of Monmouth Beach, 78 N.J. 544, 556 (1979).

In Sica, supra, our Supreme Court held that in dealing with inherently beneficial uses boards must apply a "balancing test" which requires them to: (1) identify the public interest at stake, recognizing that some uses are "more compelling" than others; (2) identify the detrimental impact of the variance; (3) study whether the detrimental impact can be mitigated by imposing reasonable conditions; and (4) weigh the positive criteria against the negative criteria "and

determine whether, on balance, the grant of the variance would cause substantial detriment to the public good." Sica, supra, 127 N.J. at 164-66; New Brunswick Cellular Tel. Co. v. Borough of South Plainfield, ___ N.J. Super. ___ (1997); see also N.J.S.A. 40:55D-70 (as amended June 30, 1997.)

We are convinced, as was Judge Weiss, that the Board acted properly in balancing the interests of all concerned. Further, the Board acted within its discretion in granting the "C" variances required by the revised site-plan. N.J.S.A. 40:55D-70(c) (2) allows the grant of such variances where the purposes of the MLUL would be advanced by a deviation from a zoning ordinance requirement "and the benefits of the deviation would substantially outweigh any detriment." See Kaufmann v. Warren Township Planning Bd., 110 N.J. 551, 566 (1988); Bressman v. Gash, 131 N.J. 517 (1993) ; Commercial Realty & Resources Corp. v. First Atlantic Properties Co., 235 N.J. Super. 577, 594 (App. Div. 1989), aff'd, 122 N.J. 546 (1991).

The Board took great pains to preserve the historic building and identified the detrimental effects of the proposal. It disapproved the initial site-plan because the addition was incompatible with the historic building and the parking lot was in the front yard. It caused modifications to be made and placed limits on the location and time of non-religious activities so as not to disturb the neighbors.

Finally, regarding plaintiffs' contention that the Board improperly allowed applicant to bifurcate the application, we find that the Board acted in accordance with the power granted it pursuant to N.J.S.A. 40:55D-76(b). We add that all parties were dealt with fairly under the procedures employed by the Board. Further, plaintiffs' jurisdictional argument is without merit. Judge Weiss acting as the appeal tribunal was not offended by the Board's continued proceedings and we, therefore, see no basis on which plaintiffs should be heard to object.

Affirmed.

APPENDIX E

ORDER OF SUPREME COURT OF NEW JERSEY DISMISSING APPEAL FOR FAILURE TO RAISE A SUBSTANTIAL CONSTITUTIONAL QUESTION

Filed March 11, 1998

Docket No. 45,294

Andrej Kuhl, et al., Plaintiffs-Respondents,

v.

Board of Adjustment of the Township of Montclair, et al.
Defendants

and

B'Nai Keshet Montclair Jewish Center,
Defendant-Movant.

This matter having been duly presented to the Court, it is ORDERED that the motion to dismiss the appeal (M-838) is granted; and it is further

ORDERED that the motion for summary affirmance (M-839) is dismissed as moot.

WITNESS, the Honorable Deborah T. Poritz, Chief Justice, at Trenton, this 10th day of march, 1998.

Stephen Townsend
CLERK OF THE SUPREME COURT